UNITED
NATIONS

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Security Council

Distr.
GENERAL

S/AC.26/2000/1
15 March 2000

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS
CONCERNING THE SEVENTH INSTALMENT OF "E1" CLAIMS

GE.00-60739

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## Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. Werner Melis (Chairman), David Mace and Sompong Sucharitkul, at its twenty-second session in October 1996 to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning eighteen claims included in the seventh instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait. The claims submitted to the Panel in this instalment and addressed in this report were selected by the secretariat of the Commission from among the construction and engineering claims (the "E3 Claims") on the basis of criteria established under the Rules.

## I. PROCEDURAL HISTORY

### A. The nature and purpose of the proceedings

2. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 689 (1991) dated 2 May 1991 (S/22559). Pursuant to that report, the Commission is a fact-finding body that examines claims, verifies their validity, evaluates losses, recommends compensation, and makes payment of awards.

3. The Panel has been entrusted with three tasks in its proceedings. First, the Panel determines whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission. Second, the Panel verifies whether the alleged losses are in principle compensable and had in fact been incurred by a given claimant. Third, the Panel determines whether these compensable losses were incurred in the amounts claimed.

### B. The procedural history of the claims in the seventh instalment

4. On 26 January 1999 and 27 July 1999, the Panel issued procedural orders relating to the claims. In view of the complexity of the issues raised, the volume of the documentation underlying the claims and the compensation sought by the claimants, the Panel decided to classify each of the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. The Panel thus decided to complete its review of the claims within 12 months of the date of its procedural order of 26 January 1999.

5. The Panel performed a thorough and detailed factual and legal review of the claims. The Panel considered the evidence submitted by claimants in reply to requests for information and documents. It also considered Iraq's responses to the factual and legal issues raised in the twenty-fifth report of the Executive Secretary issued on 9 November 1998 in accordance with article 16 of the Rules.

6. After a review of the relevant information and documentation, the Panel made initial determinations as to the compensability of the loss elements of each claim. Pursuant to article 38 of the Rules, the Panel retained as its expert consultants accounting and loss adjusting firms both with international and Persian Gulf experience to assist the Panel in the quantification of losses incurred in large construction projects. The Panel then directed its expert consultants to prepare comprehensive reports on each of the claims.

7. In drafting this report, the Panel has not included specific citations to restricted or non-public documents that were produced or made available to it for the completion of its work.

C. Amending claims after filing

8. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council permitted claimants to file unsolicited supplements up to and including 11 May 1998. A number of the claimants included in the seventh instalment had submitted several supplements to their claimed amount up to 11 May 1998. In this report, the Panel has taken into consideration such supplements up to 11 May 1998. The Panel has only considered those losses contained in the original claim, as supplemented by the claimants, up to 11 May 1998, except where such losses have been withdrawn or reduced by the claimants. Where the claimants reduced the amount of their losses the Panel has considered the reduced amount. This, however, does not preclude corrections relating to arithmetical and typographical errors.

D. The claims

9. This report contains the Panel's findings for losses allegedly caused by Iraq's invasion and occupation of Kuwait with respect to the following claims:

a. INTEGRA BAAC, which seeks compensation in the amount of USD 22,523,145;

b. GIK Hidrogradnja, which seeks compensation in the amount of USD 21,450,689;

c. Transkomplekt Ltd., which seeks compensation in the amount of USD 60,668,364;

d. Ingra d.d., which seeks compensation in the amount of USD 52,209,617;

e. ABB Schaltanlagen GmbH, which seeks compensation in the amount of USD 11,259,167;

f. Asea Brown Boveri AG, which seeks compensation in the amount of USD 28,665,079;

g. Hochtief Aktiengesellschaft vorm. Gebr. Helfmann, which seeks compensation in the amount of USD 569,812,167;

h. Heilit & Woerner Bau AG, which seeks compensation in the amount of USD 79,698,401;

i. Strabag AG, which seeks compensation in the amount of USD 122,118,584;

j. Hindustan Construction Company Limited, which seeks compensation in the amount of USD 17,209,851;

k. U.P. State Bridge Corporation Limited, which seeks compensation in the amount of USD 6,698,806;

l. Gammon India Limited, which seeks compensation in the amount of USD 4,171,828;

m. P.111 Impianti S.p.A., which seeks compensation in the amount of USD 677,354;

n. SICOM S.p.A., which seeks compensation in the amount of USD 1,802,048;

o. VUO Zelchorgromerport, which seeks compensation in the amount of USD 21,012,754; and

p. Energoprojekt Hidroinfenjering Consulting Engineers Co. Ltd., which seeks compensation in the amount of USD 26,172,414.

## II. LEGAL FRAMEWORK

### A. Applicable law

10. As set forth in paragraphs 16-18 and 23 of the "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'E3' Claims" (S/AC.26/1998/13) (the "First Report"), the Panel determined that paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. The Panel applied Security Council resolution 687 (1991), other

relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

11. As set forth in paragraph 16 of the "Report and Recommendations Made by the Panel of Commissioners concerning the Third Instalment of 'E3' Claims" (S/AC.26/1999/1) (the "Third Report"), the Panel determined "that 'Iraq' as used in decision 9 (S/AC.26/1992/9) means the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. At the time of Iraq's invasion and occupation of Kuwait, the Government of Iraq regulated all aspects of economic life other than some peripheral agriculture, services and trade.

C. The "arising prior to" clause

12. In its First Report, the Panel adopted the following interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) with respect to contracts to which Iraq was a party:

(a) the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., that such debts and obligations could not be brought before the Commission;

(b) the period described by "arising prior to 2 August 1990" should be interpreted with due consideration to the purpose of the phrase, which was to exclude Iraq's existing bad debts from the Commission's jurisdiction;

(c) the terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse; and

(d) the use of a three month payment delay period to define the jurisdictional period is reasonable and consistent both with the economic reality in Iraq prior to the invasion and with ordinary commercial practices.

13. The Panel finds that a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt for payment that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

14. The Governing Council's decision 7 (S/AC.26/1991/7/Rev.1), decision 9 (S/AC.26/1992/9) and decision 15 (S/AC.26/1992/15) provide specific instructions to the Panel regarding the interpretation of the "direct loss"

requirement. Applying these decisions, the Panel examined the loss types presented in the claims to determine whether, with respect to each loss element, the requisite causal link - a "direct loss" - was present.

15. The Panel made the following findings regarding the meaning of "direct loss":

(a) with respect to physical assets in Iraq and in Kuwait on 2 August 1990, a claimant can prove a direct loss by demonstrating that the breakdown in civil order in those countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its employees and that the evacuation resulted in the abandonment of the claimant's physical assets;

(b) with respect to losses relating to contracts to which Iraq was a party, Iraq may not rely on force majeure or similar legal principles as a defence to its obligations under the contract;

(c) with respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following the invasion caused the claimant to evacuate the personnel needed to perform the contract;

(d) costs incurred in taking reasonable steps to mitigate the losses incurred by the claimant are direct losses, bearing in mind that the claimant was under a duty to mitigate any losses that could reasonably be avoided after the evacuation of its personnel from Iraq or Kuwait; and

(e) the loss of use of funds on deposit in Iraqi banks is not a direct loss unless the claimant can demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible currencies and to authorize the transfer of the converted funds out of Iraq and that this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

### E. Loss of profits

16. In order to substantiate a claim for loss of profits, a claimant must prove that it had an existing contractual relationship at the time of the invasion. Second, a claimant must prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. Finally, profits should be measured over the life of the contract. A claimant must demonstrate that the contract would have been profitable as a whole. Thus, a claimant must demonstrate that it would have been profitable to complete the contract, not just that the contract was profitable at a single moment in time.

17. Calculations of a loss of profits claim should take into account the inherent risks of the particular project and the ability of a claimant to realize a profit in the past. The speculative nature of some projects requires the Panel to view the evidence submitted with a critical eye. In order to establish with "reasonable certainty" a loss of profits claim, the Panel requires that a claimant submit not only the contracts and invoices related to the various projects, but also detailed financial statements, including audited statements where available, management reports, budgets, accounts, time schedules, progress reports, and a breakdown of revenues and costs, actual and projected for the project.

## F. Date of loss

18. The Panel must determine "the date the loss occurred" within the meaning of Governing Council decision 16 (S/AC.26/1992/16) for the purpose of recommending compensation for interest and for the purpose of determining the appropriate exchange rate to be applied to losses stated in currencies other than in United States dollars. Where applicable, the Panel has determined the date of loss for each claim.

## G. Interest

19. According to decision 16 (S/AC.26/1992/16), "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award." In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards," while postponing decision on the methods of calculation and payment of interest.

20. The Panel finds that interest shall run from the date of loss, or, unless otherwise established, on 2 August 1990.

## H. Currency exchange rate

21. While many of the costs incurred by the claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore, the Panel is required to determine the appropriate rate of exchange to apply to losses expressed in other currencies.

22. The Panel finds that the exchange rate set forth in the contract is the appropriate rate for losses under the relevant contracts because this was specifically bargained for and agreed to by the parties.

23. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics on the date of loss, or, unless otherwise established, from 2 August 1990.

## I. Evacuation losses

24. In accordance with paragraph 21(b) of decision 7 of the Governing Council, the Panel finds that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant. Compensable costs consist of temporary and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation.

## J. Valuation

25. The Panel developed, with the assistance of the secretariat and the Panel's expert consultants, a verification program that addresses each loss item. The valuation analysis used by the Panel's expert consultants ensures clarity and consistency in the application of certain valuation principles to the construction and engineering claims.

26. After receipt of all claim information and evidence, the Panel's expert consultants applied the verification program. Each loss element was analysed individually according to a set of instructions. The expert consultants' analysis resulted in a recommendation of compensation in the amount claimed, an adjustment to the amount claimed, or a recommendation of no compensation for each loss element. In those instances where the Panel's expert consultants were unable to respond decisively, the issue was brought to the attention of the Panel for further discussion and development.

27. For tangible property losses, the Panel adopted historical cost minus depreciation as its primary valuation method.

## K. Evidentiary requirements

28. Pursuant to article 35(3) of the Rules, corporate claims must be supported by evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has made it clear in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to recommend compensation.

29. The category "E" claim form requires all corporations and other legal entities that have filed claims to submit with their claim form "a separate statement explaining its claim ('Statement of Claim'), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss".

30. In those cases where the original submission of the claim inadequately supported the alleged loss, the secretariat prepared and issued a written communication to the claimant requesting specific information and documentation regarding the loss (the "claim development letter"). In

reviewing the subsequent submissions, the Panel noted that in many cases the claimant still did not provide sufficient evidence to support its alleged losses.

11. The Panel is required to determine whether these claims are supported by sufficient evidence and, for those that are so supported, must recommend the appropriate amount of compensation for each compensable claim element. This requires the application of relevant principles of the Commission's rules on evidence and an assessment of the loss elements according to these principles. The recommendations of the Panel are set forth below.

III. CLAIM OF INTEGRA BAAC

32. INTEGRA BAAC (INTEGRA") is a business community (or association) registered in Bosnia & Herzegovina, which is involved in implementing or performing investment or capital works abroad. INTEGRA seeks compensation in the amount of USD 22,523,145 for contract losses, loss of property and financial losses.

Table 1. INTEGRA'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 4,253,404 |
| Loss of property | 2,147,741 |
| Financial losses | 16,122,000 |
| TOTAL | 22,523,145 |

## A. Contract losses

### 1. Facts and contentions

33. INTEGRA seeks compensation in the amount of USD 4,253,404 for contract losses allegedly incurred in connection with a number of contracts in Iraq.

(a) Hotel Palestine Meridien

34. On 13 August 1978, INTEGRA entered into a contract with the State Organization for Tourism (the "Employer") for the construction of the Hotel Palestine Meridien (the "hotel contract"). The hotel contract was scheduled to be completed in 31 months from 13 August 1978. By an addendum to the contract in April 1981, the completion date was extended to 31 December 1981. However, INTEGRA did not hand over the hotel until 7 April 1982 and did not obtain the handover certificate until 3 April 1988.

35. INTEGRA seeks compensation of USD 400,974, which represents the amount of contract debts and termination costs allegedly owed to INTEGRA less the total amount of payments received from the Employer.

(b) Iraqi Fashion House

36. INTEGRA asserted that it entered into a contract with the Ministry of Culture and Information for the construction of "the Iraqi Fashion House" (the "Iraqi Fashion House contract"). INTEGRA failed to state the date of the contract and to provide a copy thereof.

37. INTEGRA stated that work on the Iraqi Fashion House contract was performed between 1982 and 1983 and that the final handover was made on 25 September 1987. Payment of the outstanding amount of USD 304,000 was

deferred until 31 December 1990 according to a deferred payments agreement between Iraq and the former Yugoslavia. INTEGRA seeks compensation for this amount, which, it alleged, it was never paid.

(c) Iraqi Atomic Energy Commission

38. On 10 November 1984, INTEGRA entered into three contracts with the Iraqi Atomic Energy Commission ("IAEC") for the construction of a library and a complex of engineering buildings, restaurant, two cafeterias and other buildings. INTEGRA also entered into a contract with the IAEC dated 28 January 1985 for the construction of general stores (collectively referred to as the "IAEC contracts").

39. INTEGRA completed and handed over the contract works in 1987. Payment was not effected at that stage as the outstanding amount was included in a deferred payments agreement between Iraq and the former Yugoslavia.

40. INTEGRA seeks compensation of USD 2,275,616 and IQD 344,100 for allegedly unpaid contract works and compensation of USD 78,408 and IQD 10,323 for alleged termination costs.

2. Analysis and valuation

41. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

42. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) INTEGRA had, in each case, a contract with Iraq.

43. The Panel finds that the contract losses alleged by INTEGRA relate entirely to work that was performed prior to 2 May 1990.

44. The Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

45. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debts.

46. The Panel recommends no compensation for the alleged termination costs as INTEGRA has not submitted sufficient evidence to support its claims for such alleged costs.

### 3. Recommendation

47. The Panel recommends no compensation for contract losses.

## B. Loss of property

### 1. Facts and contentions

48. INTEGRA seeks compensation in the amounts of USD 969,328 and USD 1,178,413 for loss of real and tangible property in connection with the hotel and IAEC contracts, respectively.

#### (a) Hotel contract

49. INTEGRA stated that it imported new machinery, "instruments of labor" and provided pre-fabricated housing, including a cook house, restaurants, storehouse, workshop and administrative buildings into Iraq in connection with the hotel contract. INTEGRA later used some of the same construction machinery and equipment in connection with the Iraqi Fashion House and IAEC contracts. INTEGRA asserted that it was prevented from re-exporting the machinery and equipment due to both the war between Iraq and Iran and the alleged impossibility of obtaining a certificate of handover for the hotel contract.

50. INTEGRA seeks compensation in the amount of USD 969,328 for loss of construction machinery, "transportation means", measuring instruments, office equipment, office furniture, auxiliary "pre-fabricated objects" and "the equipment for the objects".

#### (b) The IAEC contracts

51. INTEGRA seeks compensation of USD 1,178,413 for loss of tangible property in connection with the IAEC contracts. INTEGRA did not explain how the property was allegedly lost or damaged or how the alleged losses arose. The properties for which INTEGRA alleged losses consisted of buildings in the workers living area, "instruments of labor", office furniture and equipment.

### 2. Analysis and valuation

52. The Panel notes that INTEGRA did not submit any evidence in support of its alleged losses except for a financial statement. INTEGRA also failed to submit any evidence of its title to or right to use the real or tangible property.

53. The Panel recommends no compensation for loss of real and tangible property as INTEGRA did not provide sufficient evidence in support of its alleged losses.

3. Recommendation

54. The Panel recommends no compensation for loss of property.

C. Financial losses

1. Facts and contentions

55. INTEGRA seeks compensation in the amounts of USD 13,160,000 and USD 2,962,000 for expenses allegedly incurred by INTEGRA for bank guarantees and insurance in connection with the hotel and IAEC contracts, respectively. INTEGRA did not provide any other information concerning this aspect of its claim despite being requested to do so in a claim development letter.

2. Analysis and valuation

56. The Panel recommends no compensation for the alleged losses as INTEGRA did not submit any evidence to support its claim.

3. Recommendation

57. The Panel recommends no compensation for financial losses.

D. Recommendation for INTEGRA

Table 2. RECOMMENDED COMPENSATION FOR INTEGRA

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract loss | 4,253,404 | nil |
| Loss of property | 2,147,741 | nil |
| Financial losses | 16,122,000 | nil |
| TOTAL | 22,523,145 | nil |

58. Based on its findings regarding INTEGRA's claim, the Panel recommends no compensation.

IV. CLAIM OF GIF HIDROGRADNJA

59. GIK Hidrogradnja Civil Engineering & General Contracting Co. ("Hidrogradnja") is a publicly owned enterprise incorporated in Bosnia & Herzegovina, which is involved in the design, construction and supervision of civil engineering and construction projects. Hidrogradnja seeks compensation in the amount of USD 21,450,689 for contract losses, financial losses and interest.

Table 3. HIDROGRADNJA'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 12,540,747 |
| Iraqi bank accounts | 2,312,586 |
| Interest | 6,597,356 |
| TOTAL | 21,450,689 |

A. Contract losses

1. Facts and contentions

60. Hidrogradnja entered into a contract dated 8 July 1981 (the "contract") with the Iraqi Ministry of Agriculture and Irrigation, the State Organization for Dams (the "Employer") for the construction and equipping of a hydroelectric power station in Al Qadissiyah. The power station was part of the Haditha Dam Project in Iraq. The original contract price was IQD 169,312,930 of which IQD 98,057,651 was allocated to the civil engineering works and IQD 71,255,279 was allocated to electrical engineering works. The contract price was later increased to IQD 169,531,028 of which IQD 98,385,922 was allocated to the civil engineering works and IQD 71,145,106 was allocated to electrical engineering works.

61. Ingra d.d., a Croatian corporation whose claim is also considered in this report, was retained by Hidrogradnja as one of the subcontractors for the provision of the electrical engineering works.

62. The contract works were divided into four sections. The first three sections comprised the supply and installation of two generating units each and the fourth section consisted of appurtenant works.

63. Contract payments were deferred under a deferred payments agreement (the "deferred payments agreement") entered into between Iraq and the former Yugoslavia.

64. The contract payments were to be made following the submission of interim certificates. The Employer deducted retention money in the total amount of 10 per cent of the contract price from the interim payments.

Under the terms of the contract, the Employer was obliged to repay the retention money in the amounts of one half per cent of the contract price following the issue of the Provisional Acceptance Certificate and one half per cent of the contract price following the issue of the Final Acceptance Certificate for each unit.

65. Hidrogradnja commenced work under the Al Qadissiyah contract in July 1981 and substantially completed the contract works by 10 September 1986. Provisional Acceptance Certificates were issued for the first three sections in 1986 and for the final section in 1987. Final Acceptance Certificates for units 1 to 3 were issued on 12 March 1988 and the Final Acceptance Certificate for unit 4 was issued on 25 June 1988.

66. Hidrogradnja alleged that units 5 and 6 were damaged prior to Iraq's invasion and occupation of Kuwait and that Ingra undertook to carry out the necessary repairs. Hidrogradnja did not explain how the damage was caused, but asserted that it was not responsible for the damage. The necessity for repairs delayed the issue of the Final Acceptance Certificates for both units. The Final Acceptance Certificate for unit 5 was issued on 10 October 1989, following which the Employer repaid the local currency portion of the retention money on 31 July 1990 to Hidrogradnja's bank account in Baghdad.

67. Hidrogradnja asserted that, as far as it was aware, the repairs of unit number 6 were completed by 2 August 1990. However, the Final Acceptance Certificate for unit number 6 was not issued with the result that Hidrogradnja did not receive either the local or foreign currency portions of the retention money due in respect of that unit on the issue of the Final Acceptance Certificate. Hidrogradnja attributed the alleged loss of the retention money to the "outbreak of war in Iraq".

68. Hidrogradnja seeks compensation in the amount of USD 10,880,148 for "registered" receivables and USD 1,660,599 for "unregistered" receivables. The claim for "registered" receivables relates to losses allegedly incurred in connection with unpaid interim certificates and retention money, which were registered under the deferred payments agreement.

69. The claim for "unregistered" receivables relates to the losses allegedly incurred in connection with the unpaid portion of the retention money for unit number 6 due for release to Hidrogradnja on the issue of the Final Acceptance Certificate for unit number 6, which was not registered under the deferred payments agreement.

2. Analysis and valuation

70. Hidrogradnja provided as evidence of its alleged losses an extract of the contract "registration" of the Haditha Project, correspondence from Hidrogradnja's bank, approval by the Central Bank of Iraq for the payment of the retention money for unit number 5, copies of the Provisional and Final Acceptance Certificates, correspondence received from Jugobanka concerning a

credit to account number 17 and money collected from Iraq under the deferred payments agreement, a review of monthly interim certificates and expected payments from 1 July 1981 to 30 August 1990 and a list of payments received according to the monthly invoices.

71. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Hidrogradnja had a contract with Iraq.

72. The Panel finds that the portion of the "registered" receivables that consists of amounts owed under the interim certificates relates entirely to work performed prior to 2 May 1990. Further, the Panel finds that the unpaid retention monies that comprise the remainder of the "registered" receivables constitute a debt or obligation of Iraq arising prior to 2 August 1990.

73. The Panel recommends no compensation of the claim for "registered receivables" as it relates to debts or obligations arising prior to 2 August 1990 and, therefore, is outside the jurisdiction of the Commission.

74. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debt.

75. The Panel finds that the portion of the claim for "unregistered" receivables that relates to losses incurred in connection with the portion of the retention money for unit number 6, payable upon the issue of the Provisional Acceptance Certificate constitutes a debt or obligation of Iraq arising prior to 2 August 1990.

76. The Panel finds that, with respect to the remaining portion of the retention money for unit number 6, due on the issue of the Final Acceptance Certificate, in the absence of any evidence to the contrary, the failure of the Employer to issue the Final Acceptance Certificate for unit number 6 was a direct result Iraq's invasion and occupation of Kuwait.

77. The Panel recommends compensation in the amount of USD 1,660,599, which represents the United States dollar equivalent of IQD 491,625, being the retention money payable under the contract for the civil engineering works for unit number 6 due on the issue of the Final Acceptance Certificate.

## 3. Recommendation

78. The Panel recommends compensation in the amount of USD 1,660,599 for contract losses.

## B. Iraqi bank accounts

### 1. Facts and contentions

79. Hidrogradnja seeks compensation of USD 2,312,586 for the loss of account number 4247 with the Alwiyah branch of the Rafidain Bank in Baghdad and account number 237 with the Al Rasheed bank in Haditha. Hidrogradnja alleged that it held IQD 654,290 and IQD 30,357 in each account, respectively.

80. According to the information provided by Hidrogradnja, the local currency portion of each payment due under the contract was deposited in Hidrogradnja's account with the Rafidain Bank in Baghdad. Hidrogradnja used its account with the Al Rasheed bank at Haditha to settle local payments.

81. Hidrogradnja asserted that Iraq's invasion and occupation of Kuwait forced it to abandon the project and withdraw from Iraq thereby irrevocably forfeiting the funds held in the accounts. Hidrogradnja alleged that it is unable to retrieve these funds and, hence, they have become unavailable and "definitely lost".

82. Hidrogradnja acknowledged in its reply to a claim development letter that the funds were not transferable and were intended to be expended in Iraq.

### 2. Analysis and valuation

83. The Panel finds that the funds in the accounts were intended to be fully expended in Iraq and were not transferable.

84. Further, Hidrogradnja submitted no evidence of its losses save for two translated statements of account from the Rafidain and Al Rasheed banks, which, according to Hidrogradnja, were issued in January 1992.

85. The Panel recommends no compensation for loss of the funds in Hidrogradnja's Iraqi bank accounts as there is no proof of loss of the funds.

### 3. Recommendation

86. The Panel recommends no compensation for financial losses.

## C. Interest

87. With reference to the issue of interest, the Panel refers to paragraphs 18 and 19 of this report.

D. Recommendation for Hidrogradnja

Table 4. RECOMMENDED COMPENSATION FOR HIDROGRADNJA

| Claim element | Claim amount (USD) | Recommended compensation (USD) |
|---|---|---|
| Contract losses | 12,540,747 | 1,660,599 |
| Iraqi bank accounts | 2,312,586 | nil |
| Interest | 6,597,356 | nil |
| TOTAL | 21,450,689 | 1,660,599 |

88. Based on its findings regarding Hidrogradnja's claim, the Panel recommends compensation in the amount of USD 1,660,599.

V. CLAIM OF TRANSKOMPLEKT. LTD.

89. Transkomplekt Ltd. ("Transkomplekt"), a Bulgarian state owned limited liability company, sought in its original submission compensation in the amounts of IQD 10,285,399 (USD 33,004,704) and USD 47,250,590 for contract losses, losses relating to tangible and income producing properties, payment or relief to others, and various other losses.

90. In its reply to a claim development letter, Transkomplekt made significant changes to its claim on the basis that since the date of its original submission, the project, in connection with which the alleged losses arose, had been completed. Although Transkomplekt reduced the total claimed amount to USD 74,225,570 for contract losses, real property losses, loss of tangible property, payment or relief to others, loss of profits, other losses and interest, it increased some loss items and introduced new loss items. The Panel has only considered those losses contained in the original claim except where such losses have been withdrawn by Transkomplekt. Where Transkomplekt reduced the amount of losses in its reply to the claim development letter, the Panel has considered the reduced amount.

91. The Panel, therefore, has considered the reduced amount of USD 60,668,364.

Table 5. TRANSKOMPLEKT'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 3,276,657 |
| Real property losses | 3,016,356 |
| Loss of tangible property | 37,286,409 |
| Payment or relief to others | 94,400 |
| Loss of profits | 14,447,100 |
| Other losses | 1,009,835 |
| Interest | 1,537,607 |
| TOTAL | 60,668,364 |

## A. Contract losses

### 1. Facts and contentions

92. On 3 August 1986, Transkomplekt entered into a contract (the "contract") with the Iraqi State Corporation for Roads and Bridges (the "Employer") for the construction of two sections of a freeway described therein as "Expressway No.1, Sections R/5A & R/5B - Hilla-Diwaniya and Diwanya freeway" (the "project").

93. The project was due to be completed in 24 months from 13 September 1986 and a maintenance period of 12 months was to run from the date of completion. The first of the two sections, section R/5A, was opened for regular operation in February 1989. However, the Employer did not accept the section until 3 January 1991 subject to completion of a number of outstanding matters.

94. The Employer extended the completion date for section R/5B to 13 January 1991. Transkomplekt continued to work on the section following Iraq's invasion and occupation of Kuwait until 14 January 1991, the date upon which it left the project site and evacuated its employees. Transkomplekt alleged that it was granted exit visas for its employees on condition that the issue of exit visas did not exempt Transkomplekt from its contractual obligations and that the responsibility for any consequences due to the departure of the employees was that of Transkomplekt. Transkomplekt stated that after 14 January 1991 it assigned completion of the contract works to the Resident Engineer's office.

95. Transkomplekt stated that in June and July 1991, its representatives visited the project site and discovered that it had been burnt and destroyed. At the time of their visit, the project site was allegedly occupied by Iraqi army personnel. Transkomplekt asserted that during these visits its representatives prepared a claim for compensation, which it submitted to the Employer in July 1991, and also wrote to the Resident Engineer requesting that a committee be established to consider its claim for damages.

96. Transkomplekt stated that it corresponded with the Employer from 1991 to 1995 with a view to obtaining the "Final" and "Maintenance Certificates". Transkomplekt stated that a "Final Certificate" was issued on 19 September 1993 and a "Maintenance Certificate" was issued 23 November 1994. On 16 March 1995, the Employer issued the final measurement for section R/5B. In April 1995, the Employer wrote to the General State Organization of Taxes requesting that the necessary action be taken to obtain a "Clearance Certificate". Transkomplekt asserted, however, that due to present conditions in Iraq it is not possible to obtain all necessary documentation to obtain payment.

(a) 5 per cent cash payments

97. Under the terms of the contract, the Employer was obliged to pay Transkomplekt 50 per cent of the contract price in Iraqi dinar, 45 per cent in United States dollars, which was to be deferred under a credit arrangement between Iraq and Bulgaria, and 5 per cent cash payments in United States dollars. The amount of the cash payments was based on the amount of work recorded in monthly certificates submitted by Transkomplekt to the Employer. The Central Bank of Iraq was responsible for transferring the cash payments to Transkomplekt via the Bulgarian Foreign Trade Bank.

98. Transkomplekt stated that the Central Bank of Iraq made 11 payments of the cash portion between February 1988 and April 1990 totaling USD 1,130,812. Transkomplekt seeks compensation of ID 965,994 in respect of the remaining 5 per cent cash portions, which, Transkomplekt alleged, were withheld by the Central Bank of Iraq as a result of Iraq's invasion and occupation of Kuwait.

(b) Advance payments to subcontractors

99. Transkomplekt asserted that it made advance payments to three of its subcontractors, Philips, Comaco and G.T.C. Kuwait in respect of services, which, it alleged, were never performed as a result of Iraq's invasion and occupation of Kuwait. Transkomplekt subsequently withdrew its claim in respect of G.T.C. Kuwait in its reply to a claim development letter. Transkomplekt provided only a very brief description of the services provided by Philips and Comaco. Transkomplekt seeks compensation of ID 55,125 in respect of advance payments allegedly made to Philips and Comaco.

2. Analysis and valuation

100. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Transkomplekt had a contract with Iraq.

101. Transkomplekt asserted in its reply to the claim development letter that prior to Iraq's invasion and occupation of Kuwait, the Central Bank of Iraq had failed to transfer amounts into its account in Bulgaria on the basis that there were shortages of convertible currency. Hence, there had been ongoing delays in paying the cash portion prior to Iraq's invasion and occupation of Kuwait as there were already cash shortages at the Central Bank of Iraq.

102. The Panel recommends no compensation for the part of the allegedly unpaid 5 per cent cash portion that relates to work performed prior to 2 May 1990 as it is outside the jurisdiction of the Commission.

103. With reference to the remainder of the claim for the allegedly unpaid 5 per cent cash portion that is within the jurisdiction of the Commission, the Panel recommends no compensation as Transkomplekt failed to demonstrate that the Employer's failure to pay was a direct result of Iraq's invasion and occupation of Kuwait.

104. Transkomplekt provided as evidence of the advance payments allegedly made to the subcontractors, Philips and Comaco, copies of balance sheets for the years 1991 to 1996 and an affidavit of its former chief accountant verifying the amounts due. However, Transkomplekt failed to provide proof of payment to the subcontractors.

105. The Panel recommends no compensation for the amounts allegedly due from the subcontractors, Philips and Comaco, as Transkomplekt did not provide sufficient evidence in support of its alleged losses.

### 3. Recommendation

106. The Panel recommends no compensation for contract losses.

## B. Real property losses

### 1. Facts and contentions

107. Transkomplekt seeks compensation of ID 940,000 (USD 3,016,356) for the cost of repairing damage allegedly caused to the completed contract works. Transkomplekt stated that the repairs were carried out by the Resident Engineer at Transkomplekt's expense.

108. Transkomplekt had included this aspect of its claim as loss of tangible property in the "E" claim form, but due to nature of the alleged losses it has been reclassified as loss of real property.

### 2. Analysis and valuation

109. Transkomplekt failed to provide any evidence of its title to or right to use of the damaged property. It provided information on the units rates and a summary of the Bill of Quantities, but omitted to provide a copy of the Bill of Quantities itself. Transkomplekt failed to provide evidence of payment of the alleged repair costs.

110. The Panel recommends no compensation for loss of real property as Transkomplekt has failed to provide sufficient evidence in support of its alleged losses.

### 3. Recommendation

111. The Panel recommends no compensation for loss of real property.

## C. Loss of tangible property

### 1. Facts and contentions

112. Transkomplekt seeks compensation of USD 37,286,409 for loss of tangible property as set out below:

| Loss item | Asserted value (USD) |
|---|---|
| Machinery and equipment | |
| - Transkomplekt | 16,560,000 |
| Subcontractors: | |
| - Electroimpex | 302,919 |
| - Autotransport | 8,534,040 |
| - G.T.C. Kuwait | 667,450 |
| - Al-Rayhana | 3,050,000 |
| Subtotal | 29,114,409 |
| Furniture | 7,329,000 |
| Materials in stock | 843,000 |
| TOTAL | 37,286,409 |

113. Transkomplekt originally stated a loss of tangible property in the amounts of IQD 1,569,512 and USD 3,733,555. However, it had incorrectly classified losses that should have been classified as loss of tangible property under other loss headings. Therefore, the corrected value of Transkomplekt's claim for loss of tangible property is USD 37,286,409.

114. Transkomplekt stated that in June and July 1991, its representatives visited the project site and discovered that it had been burnt and destroyed. Reports provided by Transkomplekt allege that the destruction of Transkomplekt's property occurred during an attack on the project camp in March 1991.

### 2. Analysis and valuation

115. Transkomplekt failed to provide copies of invoices or other documents of title in respect of any of the tangible property. It asserted that these records have been destroyed.

116. The Panel recommends no compensation as Transkomplekt has failed to provide sufficient evidence of its title to or right to use the tangible property.

### 3. Recommendation

117. The Panel recommends no compensation for loss of tangible property.

## D. Payment or relief to others

### 1. Facts and contentions

118. Transkomplekt stated that there were 386 employees on the project site on 2 August 1990. It alleged that its employees and their dependants were initially detained in Iraq following Iraq's invasion and occupation of Kuwait, but after 1 September 1990 they were permitted to leave Iraq. Transkomplekt alleged that its employees and their dependants were evacuated from Iraq between September 1990 and 14 January 1991.

119. Transkomplekt seeks compensation of USD 94,400 for payment or relief to others in respect of the additional costs of evacuating its employees and their dependants.

120. Transkomplekt asserted that the estimated usual cost of repatriation was USD 70 per person, whereas the actual cost of repatriation was on average USD 382 per person. Thus, Transkomplekt calculated that the additional cost of evacuation per person was USD 312. Although Transkomplekt stated that it evacuated 386 persons, it only sought additional costs in respect of 303 persons.

121. According to Transkomplekt, the evacuation was organized as follows:

| Evacuation route | Number of evacuees |
|---|---|
| Bus to Amman and flight to Bulgaria | 53 |
| Flight to Bulgaria via Moscow with Aeroflot | 15 |
| Flight to Bulgaria with Iraqi Airways | 121 |
| Bus to Bulgaria via Turkey | 107 |
| Flight to Bulgaria with Balkan Airlines | 60 |
| Company transport to Bulgaria | 30 |
| TOTAL | 386 |

### 2. Analysis and valuation

122. The Panel finds that based on the actual cost of evacuating the 107 persons by bus via Turkey, the normal cost of repatriating employees from Iraq was USD 153 per person.

123. The Panel notes that with the exception of the evidence submitted in respect of evacuating the 107 persons by bus via Turkey, the only evidence of payment provided by Transkomplekt is evidence of payment to the Bulgarian Embassy for the cost of bus fares and customs duties incurred in evacuating 50 persons by bus from Baghdad to Amman.

124. The Panel recommends compensation of USD 4,566 for the extraordinary costs of evacuating the 50 persons by bus to Amman for which Transkomplekt has provided evidence of payment. The Panel has determined this amount by deducting the amount of USD 7,650, which represents the normal cost of repatriating employees from Iraq per person multiplied by 50 persons, from the claimed amount of IQD 3,807 (USD 12,216) to arrive at an extraordinary cost of USD 4,566.

125. The Panel recommends no compensation for the other claimed losses under this heading as Transkomplekt has not provided sufficient proof of payment of the asserted costs in support of its alleged losses.

### 3. Recommendation

126. The Panel recommends compensation in the amount of USD 4,566 for payment or relief to others.

## E. Loss of profits

### 1. Facts and contentions

127. Transkomplekt seeks compensation for two alleged losses, which due to their nature have been reclassified as claims for loss of profits. Transkomplekt seeks compensation of USD 14,040,000 for the alleged loss of rental income from leasing plant and equipment and USD 407,100 for allegedly reduced productivity between 2 August 1990 and 14 January 1991.

128. Transkomplekt asserted that its would have rented out plant and machinery following completion of section R/5B on 13 January 1991. Transkomplekt alleged that as a result of Iraq's invasion and occupation of Kuwait it was unable to do so and, therefore, lost expected rental income. The alleged loss is calculated at 75 per cent of the asserted rental value for each item of plant and machinery.

129. Transkomplekt also asserted that its monthly productivity decreased between August 1990 and January 1991 from IQD 546,904 to IQD 124,024, resulting in loss of productivity of IQD 422,880 per month. It calculated monthly productivity by dividing the total value of construction works by 52, being the number of months over which it alleged the contract had been ongoing. Transkomplekt calculated its alleged losses by assessing loss of profits at 7.5 per cent of lost productivity for 4 months, i.e., from September to December 1990, which amounted to IQD 126,864 (USD 407,100).

### 2. Analysis and valuation

130. In its previous reports, the Panel has held that claimants must provide evidence that establishes with reasonable certainty ongoing and expected profitability to support a claim for loss of profits. In the

absence of such evidence, the Panel will not recommend compensation for loss of profits.

131. Transkomplekt provided a list of machinery, which contains details of the quantity of each type of machinery and the achievable monthly rental charge as evidence of its alleged loss of rental income. The list is not supported by any documentary evidence.

132. Transkomplekt provided as evidence of its alleged loss of productivity an analysis that compares the four months for which the losses are claimed with the preceding 52 months of the contract. However, Transkomplekt failed to provide documentary evidence in support of the asserted profit margin.

133. The Panel recommends no compensation as Transkomplekt has failed to provide with respect to each loss evidence that establishes with reasonable certainty ongoing and expected profitability.

### 3. Recommendation

134. The Panel recommends no compensation for loss of profits.

## F. Other losses

### 1. Facts and contentions

135. Transkomplekt seeks compensation for the cost of rents (IQD 42,557), salaries (USD 159,957), security at the project site (IQD 135,000), insurance against war risk for its employees (USD 15,176), Resident Engineer office support costs (IQD 30,000), lawyers fees (IQD 2,565) and the cost of preparing a claim to the Employer (IQD 50,000).

#### (a) Rents

136. Transkomplekt seeks compensation of IQD 33,657 for the alleged cost of one year's rent for its camp and workshop at Shomeli. Transkomplekt alleged a loss on the basis that it was obliged to pay rent for three years after the anticipated completion date of July 1992. However, it seeks compensation for only one year's rent.

137. Transkomplekt also seeks compensation of IQD 4,400 for rent allegedly paid in 1991 in respect of four other sites and IQD 4,500 in respect of an advance on another quarry, which it was unable to use.

138. Transkomplekt did not provide a copy of any of the relevant lease agreements or evidence of payment of rent.

(b) Salaries

139. Transkomplekt seeks compensation of USD 159,957 for salaries it allegedly paid to 11 employees in 1991 as well as to four staff in the office of the Resident Engineer.

140. Transkomplekt provided copies of contracts for only five of the 11 employees. Moreover, it did not provide proof of payment of any of the alleged salaries.

(c) Security costs

141. Transkomplekt seeks compensation of IQD 135,000 for the cost of hiring a security guard to protect the project site over a period of nine months. Transkomplekt entered into a contract with the security guard dated 14 January 1991 for the protection of the camp over a period of five months. The evidence provided by Transkomplekt suggests that Transkomplekt extended its contract with the security guard to 15 July 1991. The only evidence that the contract was extended for another three months was the written testimony of Transkomplekt's accountant that he prepared accounts for payment of security costs of IQD 135,000, which would be the total amount due for nine months work.

142. Transkomplekt provided a copy of the contract with the security guard and a letter regarding extension of the contract, but did not provide further evidence of payment.

(d) War risk insurance

143. Transkomplekt seeks compensation of USD 15,176 for the alleged cost of the premiums for war risk insurance, which Transkomplekt stated it obtained for 300 of its employees from 17 September to 31 December 1990. Transkomplekt provided a copy of an invoice for a premium for the relevant period and a payment order dated 5 December 1990. However, Transkomplekt failed to provide a copy of the insurance policy, to explain the nature of the insurance or to identify the employees it allegedly insured. Transkomplekt also failed to demonstrate that such expenditures were temporary and extraordinary in nature.

(e) Resident Engineer office support costs

144. Transkomplekt seeks compensation of IQD 30,000 for the cost of supporting the office of the Resident Engineer in 1991. It did not explain how such costs resulted from Iraq's invasion and occupation of Kuwait and did not to provide any evidence of payment of the alleged expenses.

(f) Lawyer's expenses

145. Transkomplekt seeks compensation of IQD 2,565 in respect of expenses incurred in retaining a lawyer to deal with issues and disputes arising in connection with the contract. Transkomplekt did not explain how these expenses were incurred as a direct result of Iraq's invasion and occupation of Kuwait nor did it provide any evidence of payment of the alleged expenses.

(g) Claim preparation costs

146. Transkomplekt seeks compensation of IQD 50,000 for the alleged cost of preparing a separate claim, which it allegedly submitted to the Employer on 16 July 1991. Transkomplekt did not provide details or evidence of the asserted claim preparation costs.

2. Analysis and valuation

147. Transkomplekt provided, in addition to the evidence noted above, an affidavit of its chief accountant on site, which stated that the balance sheet for 1991 included accruals of the alleged expenses.

148. The Panel recommends no compensation for financial losses as Transkomplekt has failed to provide sufficient evidence of its alleged losses.

3. Recommendation

149. The Panel recommends no compensation for financial losses.

G. Interest

150. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

H. Recommendation for Transkomplekt

Table 6. RECOMMENDED COMPENSATION FOR TRANSKOMPLEKT

| Claim element | Claim amount (USD) | Recommended compensation (USD) |
|---|---|---|
| Contract losses | 3,276,657 | nil |
| Real property losses | 3,016,356 | nil |
| Loss of tangible property | 37,286,409 | nil |
| Payment or relief to others | 94,400 | 4,566 |
| Loss of profits | 14,447,100 | nil |
| Other losses | 1,009,835 | nil |
| Interest | 1,537,607 | nil |
| TOTAL | 60,668,364 | 4,566 |

151. Based on its findings regarding Transkomplekt's claim, the Panel recommends compensation in the amount of USD 4,566.

## VI. CLAIM OF INGRA

152. Ingra d.d. ("Ingra") is a Croatian engineering and construction corporation. Ingra seeks compensation of USD 52,218,463 for contract losses, loss of tangible property, loss of profits, other losses and interest.

153. The Panel notes, however, that the correct total claim amount as detailed in the table below, amounts to USD 52,209,617.

Table 7. INGRA'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 41,341,786 |
| Loss of tangible property | 2,500,000 |
| Loss of profits | 659,534 |
| Other losses | 126,400 |
| Interest | 7,581,897 |
| TOTAL | 52,209,617 |

## A. Contract losses

### 1. Facts and contentions

#### (a) Substations contract

154. Ingra entered into a contract on 12 April 1988 with the State Establishment of Baghdad Electricity Distribution (the "Employer") for the manufacture and delivery of electrical equipment and spare parts for twenty three substations. The value of the contract was USD 12,745,868.

155. Ingra stated that it delivered electrical equipment and spare parts for a number of substations to Iraq between December 1989 and May 1990. The value of the deliveries was USD 5,695,093. According to the contract, 15 per cent was to be paid by a letter of credit by July 1990 and the remaining 85 per cent was to be paid through a credit scheme afforded to the Employer by Ingra pursuant to a deferred payments agreement between Iraq and the former Yugoslavia (the "credit portion").

156. Ingra asserted that the Employer failed to discharge the credit portion as a result of Iraq's invasion and occupation of Kuwait. Ingra seeks compensation of USD 4,840,829 for losses arising in connection with the alleged failure of the Employer to discharge the credit portion.

157. Ingra also asserted that it was impossible to make any further deliveries to Iraq as a result of Iraq's invasion and occupation of Kuwait.

Ingra stated that it retained the undelivered equipment at the manufacturer's warehouse from 2 August 1990 to 31 December 1993. Following this period, Ingra sold part of the undelivered equipment worth USD 1,488,728 or used it for other projects. Ingra asserted that the remaining equipment, worth USD 455,436, is still stored in the manufacturer's warehouse. Ingra seeks compensation of USD 455,436 in respect of the equipment that it alleged it was unable to deliver.

(b) Hemren Dam contract

158. Ingra stated that it was a nominated subcontractor to Hidrogradnja for the Hemren Dam project. Ingra did not provide a copy of the contract, but it would appear to have signed the contract in or around 1976. According to Ingra, the contract works were completed in 1981, but the Final Acceptance Certificate for the project was not issued until 1985.

159. Ingra asserted that the amount of USD 878,666 is due under the contract to Ingra and two other entities from Slovenia, Metalna Co. and Litostroj. This amount represented the retention money due under the contract. Ingra asserted that its share of the retention money amounts to USD 303,056.

160. The claimed amount was the subject of a deferred payments agreement between Iraq and the former Yugoslavia. The debt was rescheduled a number of times with the last such arrangement coming into effect in October 1990.

161. Ingra also seeks compensation of USD 303,056 for alleged loss of retention money withheld under the contract.

(c) Oil complex contract

162. Ingra entered into a contract on 25 January 1981 with the Ministry for Housing and Construction (the "Employer") for the turnkey construction of an oil complex project in Baghdad. The value of the contract was IQD 37,750,000.

163. The contract works were completed in 1989. The Employer signed the Provisional Completion Certificate on 15 July 1989 from which the maintenance period was to run for 18 months until 15 January 1991. Ingra asserted that it was prevented from completing the maintenance period as a result of Iraq's invasion and occupation of Kuwait.

164. Payments under the contract were deferred under a deferred payments agreement between Iraq and the former Yugoslavia.

165. Ingra seeks compensation for contract losses of USD 11,271,233 for allegedly unpaid work performed before 15 July 1989, USD 2,021,462 for unpaid work carried out after 15 July 1989 and USD 4,764,981 for the alleged loss of retention money.

(d) Haditha Power Station contract

166. Ingra was a nominated subcontractor to Hidrogradnja for the Haditha (Al Quadissiah) Hydroelectric Power Plant. It was involved in the manufacture, supply and installation of hydro-mechanical and electrical equipment for the project. The contract works were divided into six units. The Final Acceptance Certificate for units numbers 1 to 3 was issued on 12 March 1988, the Final Acceptance Certificate for unit number 4 was issued on 25 June 1988 and the Final Acceptance Certificate for unit number 5 was issued on 20 October 1989. The Provisional Acceptance Certificate for unit number 6 was issued on 15 August 1987. Ingra asserted that the issue of the Final Acceptance Certificate for unit number 6 was prevented as result of Iraq's invasion and occupation of Kuwait.

167. Payments under the contract were deferred under a deferred payments agreement between Iraq and the former Yugoslavia.

168. Ingra seeks compensation for contract losses of USD 17,684,789. This amount represents the amount of contract debts "recorded" under the deferred payments agreement of USD 15,492,238 and contract debts of USD 2,192,551, which had not yet been "recorded" under the deferred payments agreement. Ingra stated that the amount of USD 2,192,551 should have been recorded in 1990 "but had not been because of the ongoing war". The alleged losses appear to include a claim for retention money in respect of unit number 5.

2. Analysis and valuation

(a) Substations contract

169. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Ingra had a contract with Iraq.

170. The Panel finds that the invoices for the alleged delivery of equipment and spare parts for substations numbers 5 to 8 relate to the delivery of equipment prior to 2 May 1990. The Panel, therefore, finds that the alleged losses arising in connection therewith represent debts and obligations of Iraq arising prior to 2 August 1990 and are outside the jurisdiction of the Commission.

171. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debt.

172. The Panel recommends no compensation for the alleged losses incurred in connection with the unpaid invoices for the alleged delivery of equipment and spare parts for substations numbers 9 to 12 as Ingra has not submitted sufficient evidence of delivery of the equipment to Iraq.

173. The Panel recommends no compensation for the alleged losses incurred in connection with the undelivered equipment as Ingra has not submitted sufficient evidence in support of its alleged losses.

(b) Hemren Dam contract

174. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Ingra had a contract with Iraq.

175. The Panel finds that the retention money for which Ingra alleged a loss became due to Ingra in 1985.

176. The Panel recommends no compensation as the alleged losses represent debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

177. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debt.

(c) Oil complex contract

178. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Ingra had a contract with Iraq.

179. The Panel finds that the work to which the claim for unpaid invoices relates was performed prior to 2 May 1990.

180. The Panel recommends no compensation for losses arising in connection with the unpaid invoices as they relate to work performed prior to 2 May 1990 and, therefore, are outside the jurisdiction of the Commission.

181. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debt.

182. Ingra failed to submit copies of invoices relating to the work or documentary evidence that the Employer had accepted the work, such as Preliminary or Final Completion Certificates, in support of its alleged losses incurred in connection with work performed after 15 July 1989 for which Ingra asserted it was not paid.

183. The Panel recommends no compensation for the alleged losses arising in connection with the work performed after 15 July 1989 as Ingra has not submitted sufficient evidence of its alleged losses.

184. The Panel finds that the portion of the retention money, which amounted to two and one half per cent of the contract value (see reference to the contract value in paragraph 160), due on the issue of the Provisional Completion Certificate on 15 July 1989 constitutes a debt or obligation of Iraq arising prior to 2 August 1990 and, therefore, is outside the jurisdiction of the Commission.

185. The Panel finds that with respect to the remaining portion of the retention money, which amounted to two and one half per cent of the contract value (see reference to the contract value in paragraph 160), due on the issue of the Final Completion Certificate, in the absence of any evidence to the contrary, the Employer failed to issue the Final Acceptance Certificate as a direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends compensation in the amount of USD 3,187,778, which represents the portion of the retention money payable under the contract on the issue of the Final Acceptance Certificate.

(d) Haditha Power Station contract

186. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Ingra had a contract with Iraq.

187. The Panel finds that the work to which the claim for unpaid contract debts "recorded" under the deferred payments agreement was performed prior to 2 May 1990.

188. The Panel recommends no compensation for the alleged losses incurred in connection with such "recorded" amounts as they relate to work performed prior to 2 May 1990 and, therefore, are outside the jurisdiction of the Commission.

189. The Panel finds that for the purposes of the "arising prior to" clause in Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debt.

190. The Panel recommends that the retention money for unit number 5 included in the "recorded" amounts, comprises a debt or obligation of Iraq arising prior to 2 August 1990 and, therefore, is outside the jurisdiction of the Commission.

191. The Panel recommends no compensation for the "unrecorded" amount as Ingra has not submitted sufficient evidence in support of its alleged losses.

3. Recommendation

192. The Panel recommends compensation in the amount of USD 3,187,778 for contract losses.

## B. Loss of tangible property

193. Ingra seeks compensation of USD 2,500,000 for the alleged loss of equipment and cars from the Oil Complex project site.

194. Ingra did not describe the circumstances under which the property was lost and failed to provide more detailed information and documentation despite being requested to do so in a claim development letter.

195. The Panel recommends no compensation as Ingra has not submitted sufficient evidence of its title to or right to use the property.

196. The Panel recommends no compensation for loss of tangible property.

## C. Loss of profits

### 1. Facts and contentions

197. Ingra seeks compensation of USD 659,534 for loss of profits in connection with the Substations contract. Ingra asserted that due to "interrupted payments", it was forced to cancel the manufacture of the rest of the equipment due to be delivered under the contract in the total amount of USD 5,106,611. It also alleged that the value of the equipment it was unable to deliver to Iraq and which it sold or used for other projects without profit was USD 1,488,728. Ingra asserted that it would have earned a profit of 10 per cent on each amount.

### 2. Analysis and valuation

198. The Panel finds that Ingra's allegation that a profit would have been made is unsupported. Ingra provided no documentary evidence specific to this aspect of its claim despite being requested to do so in a claim development letter.

199. The Panel recommends no compensation for loss of profits as Ingra has not submitted evidence that establishes with reasonable certainty ongoing and expected profitability.

### 3. Recommendation

200. The Panel recommends no compensation for loss of profits.

## D. Other losses

201. Ingra seeks compensation of USD 126,400 for the alleged cost of storing the undelivered equipment under the Substations contract.

202. Ingra failed to provide evidence of payment of the storage costs, such as invoices and receipts, despite being specifically requested to do so.

203. The Panel recommends no compensation for the storage costs as Ingra has not submitted evidence in support of its alleged losses.

204. The Panel recommends no compensation for other losses.

## E. Interest

205. With reference to the issue of interest, the Panel refers to paragraphs 18 and 19 of this report.

## F. Recommendation for Ingra

Table 8. RECOMMENDED COMPENSATION FOR INGRA

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 41,341,786 | 3,187,778 |
| Loss of tangible property | 2,500,000 | nil |
| Loss of profits | 659,534 | nil |
| Other losses | 126,400 | nil |
| Interest | 7,581,897 | nil |
| TOTAL | 52,209,617 | 3,187,778 |

206. Based on its findings regarding Ingra's claim, the Panel recommends compensation of USD 3,187,778.

# VII. CLAIM OF ABB SCHALTANLAGEN GMBH

207. ABB Schaltanlagen GmbH ("ABB Schaltanlagen") is a private German corporation that is involved in the development, manufacture and marketing of switchgear and related equipment and products. Since submitting its claim to the Commission, ABB Schaltanlagen changed its name to ABB Calor Emag Schaltanlagen AG. ABB Schaltanlagen seeks compensation in the amount of DEM 17,745,251 (USD 11,360,596) for contract losses, loss of tangible property, payment or relief to others, financial losses, other losses and interest. The Panel notes, however, that taking into account the amendments to the claim by ABB Schaltanlagen noted in the following paragraph, the correct claim amount is DEM 17,577,447 (USD 11,253,167).

208. In its original submission, ABB Schaltanlagen claimed compensation for the cost of renovating its Kuwaiti office in the amount of DEM 55,350. It subsequently withdrew this aspect of its claim in a communication received by the Commission on 14 December 1998. ABB Schaltanlagen stated these losses are being claimed instead by one of its associated companies in Kuwait. ABB Schaltanlagen also reduced the amount of rent claimed for its Baghdad office to DEM 38,602 (USD 24,713) and adjusted the amount claimed for payment or relief to others from DEM 355,429 (USD 227,548) to DEM 281,578 (USD 180,268).

Table 9. ABB SCHALTANLAGEN'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 5,091,100 |
| Loss of tangible property | 757,109 |
| Payment or relief to others | 180,268 |
| Financial losses | 800,214 |
| Other losses | 24,713 |
| Interest | 4,399,763 |
| TOTAL | 11,253,167 |

## A. Contract losses

### 1. Facts and contentions

209. ABB Schaltanlagen seeks compensation of DEM 7,952,298 (USD 5,091,100) for losses arising in connection with four contracts, namely, Contract numbers 631 160, 631 209, 634 022 and 631 159.

210. ABB Schaltanlagen entered into Contract number 631 160 on 7 June 1981 with the Iraqi Ministry of Industry and Minerals, State Organization of Electricity (the "Employer") for the supply and construction of a number of

132 Kv substations in Iraq. The Employer issued the Final Acceptance Certificate for the substations on 18 October 1987.

211. ABB Schaltanlagen entered into Contract number 631 209 on 14 October 1981 with the Iraqi Ministry of Industry and Minerals, State Organization of Electricity (the "Employer") for the construction of a 132 Kv substation in Shargat, Iraq. The Employer issued the Final Acceptance Certificate for the substation on 31 August 1987. ABB Schaltanlagen seeks compensation in respect of 10 per cent of the Deutsche mark portion payable against the Final Acceptance Certificate, which it asserted the Employer failed to pay.

212. ABB Schaltanlagen entered into Contract number 634 022 on 25 April 1979 with a joint venture partner, Elektrim Co. Ltd., a Polish corporation, and the Iraqi State Organization for Oil Projects (the "Employer") for the supply and construction of electrical substations for the LPG South Project in Iraq. The parties signed a supplemental agreement on 22 May 1986 for the execution of ancillary works. The Employer issued the Final Acceptance Certificate for the substations on 15 December 1988.

213. On 20 June 1981, Toshiba Corporation ("Toshiba"), a joint venture partner of ABB Schaltanlagen, entered into Contract number 631 159 with the Iraqi Ministry of Irrigation, State Organization of Dams (the "Employer") for the construction of the Saddam (or Mosul) Dam, unit number 1. ABB Schaltanlagen signed an "Agreement for Internal Consortium" with Toshiba in September or October 1980 (the "consortium agreement"), whereby ABB Schaltanlagen and Toshiba agreed to carry out the contract works as equal partners. Under the consortium agreement, Toshiba was to act as the consortium leader.

214. The Employer issued Final Acceptance Certificates on 14 April 1988, 15 October 1988 and 24 January 1990. However, according to the minutes of a meeting held between representatives of Toshiba, ABB Schaltanlagen and the Employer on 19 December 1989, it was agreed that the Employer was entitled to withhold contract amounts in respect of various works that ABB Schaltanlagen and Toshiba had not yet completed. The parties agreed on a list of works, a so-called "Commitments List", which ABB Schaltanlagen and Toshiba were obliged to complete before they were permitted to apply for payment of the withheld amount.

215. ABB Schaltanlagen asserted that it had completed most of the items on the "Commitments List" by July 1990 and that the only remaining item was the shipment of some voltage transformers that were scheduled for delivery in August 1990. ABB Schaltanlagen stated that due to Iraq's invasion and occupation of Kuwait, it was unable to complete the delivery and, therefore, execute all of its obligations in order to obtain payment of the outstanding amounts owed to it. ABB Schaltanlagen seeks compensation in respect of the Japanese yen and Iraqi dinar amounts due to be released to ABB Schaltanlagen on completion of all items noted in the "Commitments List" less the amount of compensation received from Hermes Kreditversicherungs-AG ("Hermes"), the

German export credit insurance corporation, in Deutsche mark in respect of such losses.

2. Analysis and valuation

216. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) ABB Schaltanlagen had, with respect to Contract numbers 631 160, 631 209 and 634 022, a contract with Iraq.

217. The Panel finds that the work under Contract numbers 631 160, 631 209 and 634 022 was performed prior to 2 May 1990 as the Final Acceptance Certificates were issued in 1987 and 1988.

218. The Panel recommends no compensation for losses incurred under contract numbers 631 160, 631 209 and 634 022 as they relate to work performed and services rendered prior to 2 May 1990 and, therefore, are outside the jurisdiction of the Commission.

219. Based on the terms of the consortium agreement and the assertion by ABB Schaltanlagen that it was a "nominated sub-contractor" holding "an own and legal valid payment claim" against the Employer, the Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) ABB Schaltanlagen had, with respect to Contract number 631 159, a contract with Iraq.

220. The Panel finds that all of the work performed under Contract number 631 159, with the exception of the work performed in connection with the "Commitments List", was performed prior to 2 May 1990. The Panel, therefore, recommends no compensation for contract losses under contract number 631 159, except for the losses relating to the work performed in connection with the "Commitments List", as they are outside the jurisdiction of the Commission.

221. With respect to the losses asserted by ABB Schaltanlagen in connection with the work performed under the "Commitments List", the Panel finds that full performance by ABB Schaltanlagen of its obligations under the "Commitments List" was prevented as a direct result of Iraq's invasion and occupation of Kuwait.

222. The Panel recommends compensation of USD 155,049, which represents the the Japenese yen and Iraqi dinar amounts that would have been released by the Employer to ABB Schaltanlagen on completion by ABB Schaltanlagen of its obligations under the "Commitments List" less the amount of compensation received from Hermes in respect of such losses. The amount of USD 155,049 is calculated by converting the Japanese yen and Iraqi dinar amounts to Deutsch mark using the exchange rate set forth in the contract, and converting the Deutsch mark amounts to United States dollars at the

prevailing commercial rate, as evidenced by the United Nations Monthly Statistics, on 2 August 1990, as follows:

| Amounts due on completion of "Commitments List" | JPY | IQD | DEM | USD equivalent |
|---|---|---|---|---|
| Japanese yen amount | 58,455,276 | | | 382,999 |
| Iraqi dinar amount | | 4,258 | | 19,623 |
| Subtotal | | | | 402,622 |
| Less compensation received from Hermes | | | (386,710) | (247,573) |
| TOTAL | | | | 155,049 |

3. Recommendation

223. The Panel recommends compensation in the amount of USD 155,049 for contract losses.

B. Loss of tangible property

1. Facts and contentions

224. ABB Schaltanlagen seeks compensation in the amounts of DEM 671,556 for the alleged loss of machinery and equipment from its Kuwaiti sites, DEM 323,328 for the alleged loss of machinery and equipment from its Iraqi sites and DEM 187,720 for the alleged loss of equipment from its office and storehouse in Baghdad.

225. ABB Schaltanlagen asserted that its Kuwaiti office was devastated by Iraqi troops due to its strategic position and all the equipment located at the office was stolen or destroyed. ABB Schaltanlagen stated that all goods on its Kuwaiti project sites were also stolen or destroyed. Finally, ABB Schaltanlagen alleged that its employees' apartments were plundered and broken up and their goods stolen.

226. ABB Schaltanlagen stated that all of the equipment at its office and store in Baghdad was expropriated by the Iraqi authorities. It also asserted the theft or expropriation of goods from its Iraqi sites. ABB Schaltanlagen alleged that in any event the goods would be of no value due to non-use over a period of years.

2. Analysis and valuation

227. ABB Schaltanlagen provided inventory lists of the assets located on its Kuwaiti and Iraq project sites that were allegedly lost as evidence of its alleged losses.

228. ABB Schaltanlagen failed to submit documentary evidence such as certificates of title, receipts, purchase invoices, bills of lading, insurance documents, customs records, asset registers, hire purchase or lease agreements, transportation documents and other relevant documents generated prior to 2 August 1990, despite being requested to do so in a claim development letter. ABB Schaltanlagen asserted that it is unable to provide this documentation because it was located in its Iraqi and Kuwaiti offices.

229. The Panel recommends no compensation as ABB Schaltanlagen has failed to provide sufficient proof of its title to or right to use the plant and equipment.

3. Recommendation

230. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

231. ABB Schaltanlagen submitted a claim for DEM 77,485 for the cost of salaries paid to three of its European employees during their detention in Iraq until November 1990.

232. ABB Schaltanlagen also seeks compensation of DEM 109,168 for payment of salaries to local personnel in Iraq. ABB Schaltanlagen asserted that under Iraqi law it was obliged to retain an Iraqi legal advisor and book keeper.

233. ABB Schaltanlagen seeks compensation of DEM 33,402 for payment of salaries to its Kuwaiti staff.

234. ABB Schaltanlagen had sought compensation for the cost of indemnities and loyalty premiums of DEM 37,152, but it withdrew this aspect of its claim in its reply to a claim development letter.

235. ABB Schaltanlagen seeks compensation of DEM 20,660 for compensation it allegedly paid to its Kuwaiti employees for loss of personal belongings and DEM 17,328 for the cost of accommodation and food for some its European employees. ABB Schaltanlagen also seeks compensation in the amount of DEM 18,861 for the alleged cost of international telephone calls between its European employees and their families.

236. Finally, ABB Schaltanlagen seeks compensation in the amount of DEM 4,674 for the alleged cost of flying its European employees out of Iraq.

### 2. Analysis and valuation

237. With respect to the alleged payment of salaries to its European personnel and Kuwaiti employees, the Panel finds that ABB Schaltanlagen did not submit evidence of actual payment.

238. ABB Schaltanlagen acknowledged with respect to its Iraqi employees in its reply to a claim development letter that it has not paid those salaries, but expected that it would have to pay the outstanding salaries on returning to Iraq when "conditions there return to normal".

239. ABB Schaltanlagen acknowledged with respect to the alleged evacuation costs in its reply to a claim development letter that the cost of the air fares did not exceed the cost that it would have normally incurred on repatriating its employees on termination of the contract.

240. The Panel recommends no compensation for the alleged losses relating to payment or relief to others as ABB Schaltanlagen has failed to provide sufficient evidence in support of its alleged losses.

### 3. Recommendation

241. The Panel recommends no compensation for losses relating to payment or relief to others.

## D. Financial losses

### 1. Facts and contentions

#### (a) Iraqi bank account

242. ABB Schaltanlagen seeks compensation of DEM 1,039,193 for the alleged loss of account number 5358 with the Rafidian bank in Iraq. The monies in the account were used to cover the running costs of the Baghdad office and to cover project costs. ABB Schaltanlagen alleged that the account was expropriated by the Iraqi authorities.

#### (b) Cash on site in Iraq and Kuwait

243. ABB Schaltanlagen seeks compensation of DEM 48,611 for the alleged loss of cash on site in Kuwait and Iraq. It asserted that the contents of its safe in Iraq, comprising USD 3,055 and IQD 7,340, were expropriated by the Iraqi authorities on 3 February 1993.

244. ABB Schaltanlagen alleged that its safe in Kuwait was broken open during Iraq's invasion and occupation of Kuwait and its contents in the amount of KWD 1076 were stolen.

(c) Penalty fees

245. ABB Schaltanlagen seeks compensation of DEM 162,130 for penalty fees, which, it alleged, were payable in respect of the delayed presentation of its balance sheets to the relevant Iraqi authorities. However, in its reply to a claim development letter, ABB Schaltanlagen acknowledged that it has not actually incurred the cost of penalty fees, but it expected to do so when "business returned to normal" in Iraq.

2. Analysis and valuation

(a) Iraqi bank account

246. ABB Schaltanlagen submitted a copy of a bank statement and a document it described as a "bank reconciliation", both of which show a balance of IQD 189,645. ABB Schaltanlagen also submitted translated copies of bank statements that show that the account was in existence on 30 September 1990 and 24 August 1991.

247. ABB Schaltanlagen acknowledged that the funds held in the account were intended only for local use and "were not transferable at all".

248. The Panel recommends no compensation for losses related to the Iraqi bank account as ABB Schaltanlagen has failed to establish that it incurred a compensable loss.

(b) Cash on site in Iraq and Kuwait

249. The Panel recommends no compensation for the alleged loss of cash from ABB Schaltanlagen's site in Iraq as ABB Schaltanlagen has failed to prove that the alleged loss of the cash was a direct result of Iraq's invasion and occupation of Kuwait.

250. The Panel recommends no compensation for the alleged loss of cash from its site in Kuwait as ABB Schaltanlagen has failed to provide sufficient evidence in support of its alleged loss.

(c) Penalty fees

251. The Panel recommends no compensation of the claim for penalty fees as ABB Schaltanlagen has acknowledged that it has not paid the alleged penalty fees.

3. Recommendation

252. The Panel recommends no compensation for losses relating to financial losses.

E. Other losses

1. Facts and contentions

253. ABB Schaltanlagen seeks compensation of DEM 38,602 in respect of rental costs for its Baghdad office.

254. ABB Schaltanlagen stated that the Iraqi authorities occupied its office in Baghdad in April 1992. ABB Schaltanlagen was allegedly unable to use its office from August 1990 to April 1992. ABB Schaltanlagen acknowledged that it did not pay rent for that period nor did it receive any demands for rent, but stated that it expected that it would be required to pay rent when "business returned to normal" in Iraq.

2. Analysis and valuation

255. The Panel recommends no compensation for the alleged losses as ABB Schaltanlagen has acknowledged that it did not incur the claimed rental costs.

3. Recommendation

256. The Panel recommends no compensation for other losses.

F. Interest

257. With reference to the issue of interest, the Panel refers to paragraphs 18 and 19 of this report.

## G. Recommendation for ABB Schaltanlagen

Table 10. RECOMMENDED COMPENSATION FOR ABB SCHALTANLAGEN

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 5,091,100 | 155,049 |
| Loss of tangible property | 757,109 | nil |
| Payment or relief to others | 180,268 | nil |
| Financial losses | 800,214 | nil |
| Other losses | 24,713 | nil |
| Interest | 4,399,763 | nil |
| TOTAL | 11,253,167 | 155,049 |

258. Based on its findings regarding ABB Schaltanlagen's claim, the Panel recommends compensation in the amount of USD 155,049.

# VIII. CLAIM OF ASEA BROWN BOVERI AG

259. Asea Brown Boveri AG ("ABB") is a German public limited liability company. ABB seeks compensation of DEM 44,743,614 (USD 28,645,079) by way of a "Subsidiary Motion".

Table 11. ABB'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| "Subsidiary Motion" | 28,645,079 |
| TOTAL | 28,645,079 |

## A. "Subsidiary Motion"

### 1. Facts and contentions

260. ABB seeks compensation of DEM 44,743,614 by way of "Subsidiary Motion" in respect of amounts paid to AKA Ausfuhrkredit-Gesellschaft mbH ("AKA") under a loan agreement dated 5 May 1985 (the "loan agreement").

261. The loan agreement refinanced the payments under a contract (the "contract") dated 20 June 1981 between the Ministry of Irrigation of the Republic of Iraq, State Organization of Dams (the "Employer") and Toshiba Corporation. Toshiba Corporation signed the contract as leader of a consortium comprising Toshiba Corporation and ABB Schaltanlagen. The contract is one of the contracts, Contract number 631 159, in connection with which ABB Schaltanlagen, whose claim is considered earlier in this report, seeks compensation for contract losses.

262. ABB asserted that the Employer failed to meet the maturity dates for repayment of the loan. AKA called on ABB to reimburse it for amounts due under the loan agreement, which ABB had pledged to pay AKA pursuant to an exporter's guarantee. ABB asserted that it paid AKA the amount of DEM 44,743,614.

263. AKA has submitted a claim to this Commission for the losses it incurred in connection with the loan agreement notwithstanding that it has been reimbursed by the German export credit agency, Hermes Kreditversicherungs AG and ABB for such losses.

264. ABB asserted that if AKA's claim should be "rejected" it submitted a "Subsidiary Motion" for the losses incurred by ABB in this respect.

### 2. Analysis and valuation

265. The Panel finds that it does not have jurisdiction over such contingent claims. In addition, the Panel finds that ABB has not incurred a loss as the "Subsidiary Motion" is merely contingent upon another claim and, therefore, ABB's claim in this respect is not compensable.

3. Recommendation

266. The Panel recommends no compensation for the "Subsidiary Motion".

B. Interest

267. As the Panel recommends no compensation for "Subsidiary Motion", there is no need for the Panel to determine the date of loss from which interest would accrue.

C. Recommendation for ABB

Table 12. RECOMMENDED COMPENSATION FOR ABB

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| "Subsidiary Motion" | 28,645,079 | nil |
| TOTAL | 28,645,079 | nil |

268. Based on its findings regarding ABB's claim, the Panel recommends no compensation.

IX. CLAIM OF HOCHTIEF AKTIENGESELLSCHAFT VORM. GEBR. HELFMANN

269. Hochtief Aktiengesellschaft vorm. Gebr. Helfmann ("Hochtief"), a German engineering and construction company, is a partner in a German-Italian construction joint venture, GIMOD J.V. (the "joint venture"). The joint venture consists of three German partners, Hochtief, Ed. Zublin AG, Dr.-Ing Trapp & Co. Construction GmbH and two Italian partners, Impresit Girola Lodigiani (IMPREGILO) S.p.A. and Italstrade S.p.A.. The German joint venture partners own 60 per cent of the joint venture and the Italian partners own the remaining 40 per cent.

270. Hochtief seeks compensation of DEM 532,647,693 (USD 341,003,645) on behalf of the German partners in the joint venture for their share of contract losses, financial losses and interest allegedly incurred by the joint venture. The Italian partners, Italstrade S.p.A. and Impresit Girola Lodigiani (IMPREGILO) S.p.A. originally claimed for their share of contract losses and financial losses allegedly incurred by the joint venture. However, the Commission subsequently received a notice of withdrawal of the claims by Italstrade S.p.A. and Impresit Girola Lodigiani (IMPREGILO) S.p.A. from the Government of Italy.

271. Hochtief also seeks compensation in the amount of DEM 357,398,912 (USD 228,808,522) for a "Subsidiary Motion" on behalf of the German partners in the joint venture.

Table 13. HOCHTIEF'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 198,558,155 |
| "Subsidiary Motion" | 228,808,522 |
| Iraqi bank accounts | 9,229,359 |
| Interest | 133,216,131 |
| TOTAL | 569,812,167 |

## A. Contract losses and "Subsidiary Motion"

### 1. Facts and contentions

#### (a) Contract losses

272. On 25 January 1981, the joint venture signed a contract (the "contract") with the Ministry of Irrigation, State Organization of Dams (the "Employer") for the construction of the civil works of the Mosul Dam (later called the "Saddam Dam") in the northern part of Iraq in the vicinity of Mosul. The contract related to the construction of civil works, including hydraulic steel structures. The total contract price was IQD 485,000,000.

273. Hochtief seeks compensation for two separate alleged losses arising out of the contract. The first alleged loss in the amounts of DEM 186,304,788, DEM 90,000,000 and DEM 15,000,000 relates to various amounts at dispute between the joint venture and the Employer (the "disputed amounts"). The second alleged loss of DEM 18,843,050 relates to a number of Progress Payment Applications due, but allegedly not paid by the Employer less the amounts of compensation received from the German export credit agency, Hermes Kreditversicherungs AG ("Hermes") and from the execution of a court award.

(b) "Subsidiary Motion"

274. Hermes compensated AKA Ausfuhrkredit-Gesellschaft mbH ("AKA") for part of its losses arising out of a loan agreement, which refinanced the contract payments, and the joint venture paid AKA the amount of DEM 357,398,912 under the exporter's guarantee. Although it received payment, AKA sought compensation from this Commission separately for the losses arising out of the loan. Hochtief seeks compensation of DEM 357,398,912 on behalf on the German partners in the joint venture if the separate claim filed by AKA is not recommended for compensation by this Commission.

2. Analysis and valuation

(a) Contract losses

275. Hochtief seeks compensation of DEM 310,147,838 for contract losses. The amount of the contract losses represents the total of the disputed amounts and the amount of the unpaid Progress Payment Applications.

276. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) the joint venture had a contract with Iraq.

277. The Panel finds that the claim for the disputed amounts and the claim for the unpaid Progress Payment Applications both relate to work performed prior to 2 May 1990. The Panel, therefore, finds the claim for contract losses is outside the jurisdiction of the Commission and is not compensable.

278. The Panel finds that for the purposes of Security Council resolution 687 (1991) the loan agreement did not have the effect of novating the debts.

(b) "Subsidiary Motion"

279. The Panel finds that it does not have jurisdiction over contingent claims. In addition, the Panel finds that the joint venture has not incurred a loss as the "Subsidiary Motion" is merely contingent upon another claim and, therefore, Hochtief's claim in this respect is not compensable.

### 3. Recommendation

280. The Panel recommends no compensation for contract losses and the "Subsidiary Motion".

## B. Iraqi bank accounts

### 1. Facts and contentions

281. Hochtief seeks compensation in the amount of DEM 14,416,259 on behalf of the German partners for their share of the joint venture's bank accounts with the Rafidain Bank in Baghdad (the "Baghdad account") and the Rasheed Bank in Mosul (the "Mosul account").

282. The joint venture used the Baghdad account to receive all payments made by the Employer in Iraqi dinar and used the Mosul account to settle all local payments. Hochtief asserted that as the funds in the account resulted "from the import of capital into Iraq" they "were foreseen to be repatriated to GIMOD's bank account in Germany".

283. Hochtief asserted that the accounts were either confiscated or "blocked" by the Iraqi authorities as a consequence of the trade embargo imposed against Iraq. Hochtief asserted that it "tried via court cases by our local lawyer to remove seizure of our accounts without success".

### 2. Analysis and valuation

284. Hochtief submitted no documentary evidence to support its assertion that the accounts were confiscated or "blocked" or that it attempted to remove seizure of the accounts.

285. The Panel recommends no compensation as Hochtief failed to demonstrate how the asserted losses were a direct result of Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

286. The Panel recommends no compensation for the alleged loss of the Iraqi bank accounts.

## C. Interest

287. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

D. Recommendation for Hochtief

Table 14. RECOMMENDED COMPENSATION FOR HOCHTIEF

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 198,558,155 | nil |
| "Subsidiary Motion" | 228,808,522 | nil |
| Iraqi bank accounts | 9,229,359 | nil |
| Interest | 133,216,131 | nil |
| TOTAL | 569,812,167 | nil |

288. Based on its findings regarding Hochtief's claim, the Panel recommends no compensation.

X. CLAIM OF HEILIT & WOERNER BAU AG

289. Heilit & Woerner Bau AG ("Heilit & Woerner"), a German construction company, sought compensation in the amount of DEM 99,092,257 (USD 63,439,345) in its original claim. It subsequently revised its claim amount to DEM 124,801,303 (USD 79,898,401) comprising the amounts of DEM 454,343 (USD 290,873) for contract losses and interest, and DEM 124,346,960 (USD 79,607,528) by way of a "Subsidiary Motion".

Table 15. HEILIT & WOERNER'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 126,209 |
| "Subsidiary Motion" | 79,607,528 |
| Interest | 164,664 |
| TOTAL | 79,898,401 |

## A. Contract losses and "Subsidiary Motion"

### 1. Facts and contentions

#### (a) Contract losses

290. Heilit & Woerner entered into a contract dated 20 August 1981 with the Amanat Al Asima (the "Employer") for the construction of the Haifa Street Development Project. It also entered into a contract dated 14 September 1981 with the Employer for the construction of the Abi Nawas Development Project. Both projects involved the construction of residential housing in the city of Baghdad. The value of the Haifa Street contract was IQD 31,683,200 and the value of the Abi Niwas contract was IQD 27,722,103.

291. Heilit & Woerner substantially completed work on both projects by 1986. Maintenance Certificates for the Abu Nawas project were issued in March 1987 and October 1988. A Maintenance Certificate for the Haifa Street Development was issued in December 1987. Heilit & Woerner submitted final accounts for both projects to the Employer in February 1988.

292. Contract payments were originally intended to be made in cash, but less than two years after the contracts were signed the Employer was afforded credit facilities pursuant to a loan agreement that covered both projects and another project.

293. Heilit & Woerner asserted that its contract losses resulted from Iraq's invasion and occupation of Kuwait as it prevented Heilit & Woerner from obtaining all necessary approvals from Iraqi state agencies and interrupted repayments by Iraq under the loan agreement.

(b) "Subsidiary Motion"

294. In addition to its claims for contract losses, Heilit & Woerner submitted a "Subsidiary Motion", which is a contingent claim for compensation for the amount paid by Heilit & Woerner to AKA Ausfuhrkredit-Gesellschaft mbH ("AKA"). AKA submitted a claim for its losses even though it has been compensated by Hochtief as well as by the German export credit insurance corporation, Hermes Kreditversicherungs-AG ("Hermes"). Heilit & Woerner stated that if for any reason AKA's claim is not recommended for compensation, it wished to submit a claim for compensation in the amount of DEM 124,346,959 in respect of the amount paid to AKA under the exporter's guarantee.

## 2. Analysis and valuation

(a) Contract losses

295. Heilit & Woerner seeks compensation of DEM 197,138 for contract losses. The amount of the contract losses represents the total amount due under both contracts and the loan agreement less the amount of compensation received from Hermes.

296. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Heilit & Woerner had a contract with Iraq.

297. The Panel finds that the claim for contract losses is based on the performance of work prior to 2 May 1990 and, therefore, is outside the jurisdiction of the Commission.

298. The Panel finds that for the purposes of Security Council resolution 687 (1991) the loan agreement did not have the effect of novating the debt.

(b) "Subsidiary Motion"

299. The Panel finds that it does not have jurisdiction over contingent claims. In addition, the Panel finds that Heilit & Woerner has not incurred a loss as its "Subsidiary Motion" is merely contingent upon another claim and, therefore, the claim of Heilit & Woerner in this respect is not compensable.

## 3. Recommendation

300. The Panel recommends no compensation for contract losses and the "Subsidiary Motion".

B. Interest

301. As the Panel recommends no compensation for contract losses and the "Subsidiary Motion", there is no need for the Panel to determine the date of loss from which interest would accrue.

C. Recommendation for Heilit & Woerner

Table 16. RECOMMENDED COMPENSATION FOR HEILIT & WOERNER

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 126,209 | nil |
| "Subsidiary Motion" | 79,607,528 | nil |
| Interest | 164,664 | nil |
| TOTAL | 79,898,401 | nil |

302. Based on the its findings regarding the claim of Heilit & Woerner, the Panel recommends no compensation.

# XI. CLAIM OF STRABAG AG

303. Strabag AG ("Strabag"), a German construction company, is a partner in a joint venture with an Austrian company, Universale-Bau AG (the "joint venture"). Strabag owns a 80 per cent share in the joint venture and Universale-Bau AG owns the remaining 20 per cent. The joint venture had originally included a Germany company, Polensky & Zollner. Polensky & Zollner went into bankruptcy in 1987. Strabag and Universale-Bau AG signed an Addendum to the joint venture agreement, which eliminated Polensky & Zollner from the joint venture and assigned its share of the joint venture to Strabag.

304. Strabag seeks compensation of USD 2,481,397 on behalf of the joint venture for contract losses and interest. Strabag also seeks compensation on behalf of the joint venture in the amount of USD 119,637,187 by way of a "Subsidiary Motion".

305. In its original claim, Strabag sought compensation in the amount of DEM 153,112,520 (USD 94,543,081) and subsequently revised its claim to DEM 197,771,048 (USD 122,118,584).

Table 17. STRABAG'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 1,420,891 |
| "Subsidiary Motion" | 119,637,187 |
| Interest | 1,060,506 |
| TOTAL | 122,118,584 |

## A. Contract losses and "Subsidiary Motion"

### 1. Facts and contentions

#### (a) Contract losses

306. On 12 March 1981, the joint venture signed a contract with the Iraqi Ministry of Housing and Construction, State Corporation of Roads and Bridges (the "Employer") for the construction of Expressway No. 1, Lot 11, which comprised a 137 km freeway from Tuhala to Rutba in Iraq (the "project").

307. The contract provided for a completion time of 36 months, which was later extended by agreement between the parties to 3 May 1987. The Certificate of Completion was issued on 18 July 1987 with retroactive effect to 3 May 1987. The Maintenance Certificate was issued on 4 August 1988 with retroactive effect to 3 May 1988.

308. On 12 September 1988, the Employer and the joint venture concluded a "Protocol of Understanding", which recorded debts owed to the joint venture of IQD 98,331,902 under the contract and IQD 4,885,000 in respect of increased costs and claims. The Protocol resulted from negotiations regarding outstanding issues between the joint venture and the Employer following the issue of the Maintenance Certificate.

309. Payments under the contract were refinanced under a loan agreement pursuant to which the Employer was obliged, inter alia, to pay a portion of the contract debt in cash to Strabag.

(b) "Subsidiary Motion"

310. In addition to its claims for contract losses, Strabag submitted a "Subsidiary Motion". This is a contingent claim for the amount of the guarantee payments paid by the joint venture to AKA Ausfuhrkredit-Gesellschaft mbH ("AKA"). AKA submitted a claim for its losses arising out of the loan agreement even though it has been compensated by the joint venture as well as by the German export credit insurance corporation, Hermes Kreditversicherungs-AG ("Hermes"). If, for any reason, AKA is not deemed to be the proper claimant for these amounts, Strabag seeks compensation in the amount of DEM 193,752,426 for the amount allegedly paid by the joint venture to AKA. Strabag asserted that as the "Subsidiary Motion" is an alternative claim there is no possibility of double compensation.

2. Analysis and valuation

(a) Contract losses

311. Strabag seeks compensation of DEM 2,301,134 for contract losses. The amount of the contract losses represents the cash portion due under the terms of the loan agreement, which the Employer has allegedly failed to pay to Strabag.

312. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) the joint venture had a contract with Iraq.

313. The Panel finds that the claim for contract losses, although arising from Iraq's alleged breach of the terms of the loan agreement, is based on the performance of work prior to 2 May 1990 and, therefore, is outside the jurisdiction of the Commission.

314. The Panel finds that for the purposes of Security Council resolution 687 (1991) neither the loan agreement nor the "Protocol of Understanding" had the effect of novating the debt.

(b) "Subsidiary Motion"

315. The Panel finds that it does not have jurisdiction over contingent claims. In addition, the Panel finds that Strabag has not incurred a loss as its "Subsidiary Motion" is merely contingent upon another claim and, therefore, Strabag's claim on behalf of the joint venture in this respect is not compensable.

3. Recommendation

316. The Panel recommends no compensation for contract losses and the "Subsidiary Motion".

B. Interest

317. As the Panel recommends no compensation for contract losses and the "Subsidiary Motion", there is no need for the Panel to determine the date of loss from which interest would accrue.

C. Recommendation for Strabag

Table 18. RECOMMENDED COMPENSATION FOR STRABAG

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 1,420,891 | nil |
| "Subsidiary Motion" | 119,637,187 | nil |
| Interest | 1,060,506 | nil |
| TOTAL | 122,118,584 | nil |

318. Based on the its findings regarding Strabag's claim, the Panel recommends no compensation.

XII. CLAIM OF HINDUSTAN CONSTRUCTION COMPANY LIMITED

319. Hindustan Construction Company Limited ("Hindustan") is an Indian construction company. Hindustan seeks compensation of USD 17,209,851 for contract losses, loss of tangible property, financial losses and interest.

Table 19. HINDUSTAN'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 14,154,321 |
| Loss of tangible property | 1,903,087 |
| Other losses | 152,228 |
| Interest | 1,000,215 |
| TOTAL | 17,209,851 |

## A. Contract losses

### 1. Facts and contentions

320. Hindustan seeks compensation in the following amounts:

a. USD 3,374,985 allegedly due under an Indo-Iraq deferred payments agreement in respect of five projects, namely, the Garmat Ali, Daquq Chai, Eight Bridges, Shuiba Maqal and Sadar-al-Majar projects;

b. USD 2,260,458 representing the total of the certified payments and retention monies allegedly due to Hindustan in respect of the Sadar-al-Majar, Eight Bridges, Daquq Chai, Four Bridges, Garmat Ali and Shuiba Maqal projects;

c. USD 924,035 representing a penalty payment allegedly levied against Hindustan in respect of the Shuiba Maqal project; and

d. USD 7,594,843 allegedly owed to Hindustan as "contractual payments due" in respect of the Garmat Ali, Four Bridges, Eight Bridges and Shuiba Maqal projects.

321. The dates on which work on each of the projects was performed is not apparent as Hindustan submitted very little evidence in support of its alleged losses. However, in its description of the alleged loss of equipment in Kuwait, Hindustan stated that it completed its last project in Iraq in 1989.

322. Hindustan did not provide copies of the relevant contracts nor did it specify when the retention monies were payable under each contract. With

respect to the Shuiba Maqal project, it simply stated that the balance of the retention monies was due "on completion".

2. Analysis and valuation

323. The Panel finds that, in the absence of any evidence to the contrary, for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Hindustan had, in each case, a contract with Iraq.

324. The Panel recommends no compensation for contract losses as they constitute debts or obligations arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

325. The Panel finds that for the purposes of Security Council resolution 687 (1991) any deferred payments agreements, in so far as they related to the alleged losses, did not have the effect of novating the debts.

3. Recommendation

326. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

327. Hindustan seeks compensation of USD 463,087 and USD 1,440,000 for the alleged loss of equipment in Iraq and Kuwait, respectively.

328. Hindustan stated that following completion of its last project in Iraq in 1989, it began moving equipment and machinery back to India through Kuwait. Hindustan moved much of its equipment and machinery to Kuwait between 4 April and 29 July 1990 and stored it in a public warehouse as "in transit cargo". Hindustan alleged that it paid a refundable customs deposit equal to four to six per cent of the total value of the equipment and machinery and a non-refundable customs duty of 0.4 per cent.

329. Hindustan stated that prior to Iraq's invasion and occupation of Kuwait it was unable to transport all of its equipment and machinery from Iraq to Kuwait. Hindustan alleged that these remaining items were confiscated by Iraq without payment of compensation.

330. Hindustan asserted that following Iraq's invasion and occupation of Kuwait, it could not transport the equipment and machinery from Kuwait to India. It stated that its representative returned to the warehouse in Kuwait in March 1992 and discovered that most of the cargo was gone and whatever was left was damaged and unusable.

2. Analysis and valuation

331. Hindustan provided an inventory list as evidence of its alleged losses. With reference to its claim for the alleged loss of assets located in Kuwait, Hindustan also provided untranslated customs receipts. It is not clear as to which assets the receipts relate.

332. Hindustan failed to provide any other evidence to support its alleged losses, such as certificates of title, receipts, purchase invoices, bills of lading, insurance documents, asset registers, hire purchase or lease agreements, transportation documents or other relevant documents generated prior to 2 August 1990.

333. The Panel recommends no compensation as Hindustan has not submitted sufficient evidence of its title to or right to use the property.

3. Recommendation

334. The Panel recommends no compensation for loss of tangible property.

C. Other losses

335. Hindustan seeks compensation in the amount of USD 152,228 for the alleged loss of the refundable deposit paid in respect of the assets imported into Kuwait.

336. Hindustan provided a copy of a letter dated 13 June 1990 from Hindustan's Kuwaiti agents confirming payment of the customs deposits (and duties) together with (untranslated) copies of the customs receipts.

337. The Panel recommends no compensation for the loss of refundable customs deposits in Kuwait as Hindustan has failed to provide sufficient evidence of the alleged loss of tangible property.

338. The Panel recommends no compensation for financial losses.

D. Interest

339. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

E. Recommendation for Hindustan

Table 20. RECOMMENDED COMPENSATION FOR HINDUSTAN

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 14,154,321 | nil |
| Loss of tangible property | 1,903,087 | nil |
| Other losses | 152,228 | nil |
| Interest | 1,000,215 | nil |
| TOTAL | 17,209,851 | nil |

340. Based on its findings regarding Hindustan's claim, the Panel recommends no compensation.

XIII. CLAIM OF U.P. STATE BRIDGE CORPORATION LIMITED

341. U.P. State Bridge Corporation Limited ("U.P. State Bridge") is an Indian public sector enterprise that is involved in the construction of bridges. U.P. State Bridge seeks compensation in the amount of USD 8,698,000 for contract losses, loss of tangible property, payment or relief to others, financial losses and interest.

Table 21. U.P. STATE BRIDGE'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 6,284,000 |
| Loss of tangible property | 1,095,000 |
| Payment or relief to others | 11,000 |
| Financial losses | 83,000 |
| Interest | 1,225,000 |
| TOTAL | 8,698,000 |

A. Contract losses

1. Facts and contentions

342. U.P. State Bridge alleged a number of contract losses in the total amount of USD 6,284,000.

343. First, U.P. State Bridge asserted that it incurred losses in respect of the foreign currency portion of payments allegedly due in respect of two projects, namely the Darbandikhan and Jassan-Mandali (1&2) Bridge projects. It would appear from the information provided by U.P. State Bridge that work on the projects was completed in 1986.

344. Second, U.P. State Bridge asserted that the "flow of foreign currency installments due under Indo-Iraq Deferred Payment Agreement were held up due to the outbreak of gulf war". U.P. State Bridge did not identify the relevant projects in its statement of claim nor did it indicate the dates of performance of the work to which the alleged losses relate.

345. Finally, U.P. State Bridge alleged that it has not received payment of final bills and retention monies in respect of a number of projects including Khonaquin Bridge, Bedra Bridge, Eskikalak, Qaiyara, Mosul Kirkuk, Jacon Mondali and Girda Gosina projects.

346. U.P. State Bridge failed to state the dates on which the work was performed under these projects or the dates of the related certificates.

2. Analysis and valuation

347. U.P. State Bridge failed to provide adequate documentary evidence, such as copies of the relevant contracts, contract conditions, applications for payment, approved payment certificates, interim certificates, progress reports, account invoices and proof of actual payments received.

348. The Panel recommends no compensation for contract losses as U.P. State Bridge has not provided sufficient evidence of its recoverable losses.

3. Recommendation

349. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

(a) Loss of plant and equipment

350. U.P. State Bridge seeks compensation of USD 870,000 for loss of plant and equipment from its Baquaba and Eskikalak camps in Iraq. It also seeks compensation for loss of office equipment from its Baghdad office. U.P. State Bridge did not specify the amount of the alleged losses, but simply included the alleged losses in the amount of USD 11,000 claimed for evacuation losses.

351. U.P. State Bridge attributed the loss of plant and equipment to the forced evacuation of its project manager on the 7 January 1991 following which, it alleged, "Iraqi Military organisations" expropriated much of the property. It asserted that it had already agreed to the sale of the property and following its expropriation it incurred a shortfall in the sale proceeds.

352. U.P. State Bridge attributed the alleged loss of office equipment to the forced evacuation of its entire personnel from the Baghdad office "following the announcement by the allied forces of their action plan".

(b) Loss of motor vehicle

353. U.P. State Bridge stated that following Iraq's invasion and occupation of Kuwait, it had entered into an agreement with an Iraqi citizen to dispose of a Mercedes Benz car. It alleged that the sale was necessitated by the forced evacuation of its employees from Baghdad. U.P. State Bridge asserted that following its evacuation the car was stolen with resulting losses in the amount of USD 225,000 in respect of both the non-realization of the sale proceeds and a custom penalty allegedly payable to Iraqi customs due to non-clearance of exportation by the Iraqi Customs Department.

2. Analysis and valuation

(a) Loss of plant and equipment

354. U.P. State Bridge failed to submit any documentary evidence in support of its alleged losses except for a contract for the sale of the contents of the two camps. The contract is undated and U.P. State Bridge omitted to attach the list of items to which reference is made in the contract.

355. The Panel recommends no compensation for loss of plant and equipment as U.P. State Bridge has not submitted sufficient evidence to establish its title to or right to use the assets.

(b) Loss of motor vehicle

356. U.P. State Bridge failed to submit any evidence of its title to or right to use the motor vehicle.

357. The Panel recommends no compensation for the loss of the motor vehicle as U.P. State Bridge has not provided sufficient evidence to establish its title to or right to use the motor vehicle nor has it provided proof of payment of the alleged customs penalty.

3. Recommendation

358. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

359. U.P. State Bridge seeks compensation of USD 11,000 for the alleged costs of evacuating its employees and their dependants from Iraq.

360. U.P. State Bridge stated that as soon as "the allied forces had issued their action plan" it became necessary to close down its Baghdad office and to evacuate its employees and their dependants through Jordan. According to the documentary evidence submitted by U.P. State Bridge, it evacuated its project engineer, another engineer, his wife and daughter, a driver and a cook.

2. Analysis and valuation

361. U.P. State Bridge provided as evidence of its alleged losses copies of application forms for booking of passengers with Royal Jordan Airlines in respect of the six evacuees and copies of correspondence relating to the related prepaid ticket vouchers. However, it did not provide copies of the vouchers, invoices or the actual ticket stubs nor did it provide employee

identification numbers, Iraqi residency permit numbers or payroll records for any of its employees.

362. The Panel recommends no compensation for the evacuation costs as U.P. State Bridge has not provided sufficient evidence in support of its alleged losses.

363. U.P. State Bridge also failed to demonstrate that the expenses it allegedly incurred were in excess of the expenses it would have incurred ordinarily in repatriating its employees assuming normal completion of the contract works.

### 3. Recommendation

364. The Panel recommends no compensation for payment or relief to others.

## D. Financial losses

365. U.P. State Bridge submitted two claims for financial losses. First, it alleged that the State Bank of India issued two bank guarantees to U.P. State Bridge's Employers. U.P. State Bridge asserted that the its Employers have not released the guarantees with the result that U.P. State Bridge incurred losses of USD 19,000 in having to continue the payment of commissions.

366. Second, U.P. State Bridge asserted losses of USD 64,000 for a customs penalty and a penalty imposed by two Iraqi authorities, Income Tax and Ministry of Trade, for delays in finalizing the accounts of its Baghdad office.

367. U.P. State Bridge failed to submit any evidence in support of its alleged losses.

368. The Panel recommends no compensation for claimed losses relating to the alleged costs of the bank guarantees and customs and filing penalties as U.P. State Bridge has not provided sufficient evidence to support its alleged losses.

369. The Panel recommends no compensation for financial losses.

## E. Interest

370. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

F. Recommendation for U.P. State Bridge

Table 22. RECOMMENDED COMPENSATION FOR U.P. STATE BRIDGE

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 6,284,000 | nil |
| Loss of tangible property | 1,095,000 | nil |
| Payment or relief to others | 11,000 | nil |
| Financial losses | 83,000 | nil |
| Interest | 1,225,000 | nil |
| TOTAL | 8,698,000 | nil |

371. Based on its findings regarding U.P. State Bridge's claim, the Panel recommends no compensation.

# XIV. CLAIM OF GAMMON INDIA LIMITED

372. Gammon India Limited ("Gammon") is an Indian construction company. Gammon seeks compensation in the amount of USD 4,171,420 for loss of profits, loss of tangible property and financial losses.

373. In its original submission, Gammon sought compensation in the amounts of IQD 1,115,000 (USD 3,578,035) and USD 5,708,262. It subsequently withdrew its claim for contract losses in the amount of USD 5,114,877 in its reply to a claim development letter.

Table 23. GAMMON'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Loss of profits | 3,578,035 |
| Loss of tangible property | 575,062 |
| Financial losses | 18,323 |
| TOTAL | 4,171,420 |

## A. Loss of profits

### 1. Facts and contentions

374. Gammon seeks compensation in the amount of IQD 1,115,000 for loss of profits in connection with two projects, the Nassiriyah Bridge and the Ramadi Bridge projects in Iraq.

375. Gammon entered into a contract on 28 February 1990 with Messrs. Nabech Ismile Farhan Co. under which the bored piling and pre-stressing works on the Nassiriyah project were subcontracted to Gammon. Gammon did not commence the works by 2 August 1990 as it was awaiting various statutory clearances. It stated that it had mobilized manpower and equipment in anticipation of commencing work on the project. Gammon asserted that it was prevented from commencing work on the project as a result of Iraq's invasion and occupation of Kuwait.

376. Gammon stated that the value of the Nassiriyah Bridge contract was IQD 541,300 in respect of which it alleged that it would have earned a profit of 17.5 per cent, which it approximated as IQD 95,000.

377. Gammon had not signed a contract for the Ramadi Bridge contract by 2 August 1990. However, it asserted that it had the lowest bid for the project. Gammon alleged that the Ramadi project was worth IQD 6,800,000 in respect of which it would have earned a profit of 15 per cent, i.e., IQD 1,020,000.

2. Analysis and valuation

378. Gammon submitted a reconciliation between the "E" claim form and its annual accounts for the year ended 1991 as evidence of its alleged losses.

379. In its previous reports, the Panel has held that a claimant must provide evidence that establishes with reasonable certainty ongoing and expected profitability to support a claim for loss of profits. In the absence of such evidence, the Panel will not recommend compensation for loss of profits.

380. The Panel recommends no compensation for loss of profits as Gammon has failed to provide adequate evidence of ongoing and expected profitability in respect of either of the two projects concerned.

3. Recommendation

381. The Panel recommends no compensation for loss of profits.

B. Loss of tangible property

382. Gammon seeks compensation of IQD 179,203 for the loss of plant and machinery, furniture and fixtures, and one motor vehicle in Iraq following the evacuation of it employees in January 1991.

383. Gammon stated that at the time of Iraq's invasion and occupation of Kuwait it had plant and machinery on its Khaldiya Bridge and Basrah project sites in Iraq and office furniture and equipment in its Iraqi office. Gammon alleged that it imported the plant and machinery into Iraq on a temporary basis.

384. Gammon failed to submit evidence of its title to or right to use either the plant and machinery or the furniture and office equipment.

385. The Panel recommends no compensation as Gammon has not submitted sufficient evidence of its alleged loss.

386. The Panel recommends no compensation for loss of tangible property.

C. Financial losses

1. Facts and contentions

(a) Iraqi bank accounts

387. Gammon seeks compensation of IQD 2,059 f the alleged loss of funds held in its Iraqi bank accounts. Gammon asser ed that it held funds in the total amount of IQD 2,059 in account numbers 1530 and 2720 (the "accounts") with the Rafidain Bank in Iraq. The accounts were used by Gammon in

connection with the Al Khalidiyah Bridge and Abu Gharib Piling Works projects.

(b) Cash on site in Iraq

388. Gammon seeks compensation of IQD 3,651 for the alleged loss of cash from its Baghdad office. Gammon asserted that it left cash in the amount of IQD 3,651 with its cashier in its Baghdad office when the rest of its staff left Iraq. The cashier subsequently left Iraq on 19 January 1991 and allegedly left behind the cash in the office. Gammon stated that the Iraqi landlord, who later took over possession of the premises, informed its Iraqi accountant, who was investigating the whereabouts of the cash, that he found no cash in the premises. Gammon asserted that the cash was lost "due to attack of UN security forces".

2. Analysis and valuation

(a) Iraqi bank accounts

389. Gammon acknowledged in its reply to a claim development letter that the funds in the accounts were intended to be expended in Iraq and were not "transferable or repatriable out of Iraq at all". Gammon failed to provide an explanation of how the money in the accounts is alleged to have been lost. Gammon failed to state whether it had attempted to withdraw the funds despite being specifically requested to do so in a claim development letter.

390. The Panel recommends no compensation for loss of the balances in Gammon's Iraqi bank accounts as the funds contained therein were not transferable or repatriable.

(b) Cash on site in Iraq

391. Gammon asserted in its reply to the claim development letter that it cannot provide extracts from it cash book in support of its alleged losses as it left all documents behind in its Iraqi office, which were allegedly lost.

392. The Panel recommends no compensation as Gammon has failed to provide sufficient evidence in support of its alleged losses.

3. Recommendation

393. The Panel recommends no compensation for financial losses.

D. Recommendation for Gammon

Table 24. RECOMMENDED COMPENSATION FOR GAMMON

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 3,578,035 | nil |
| Loss of tangible property | 575,062 | nil |
| Financial losses | 18,323 | nil |
| TOTAL | 4,171,420 | nil |

394. Based on its findings regarding Gammon's claim, the Panel recommends no compensation.

# XV. CLAIM OF F.LLI DELFINO S.P.A.

395. F.lli Delfino S.p.A. ("Delfino") is an Italian company that is involved in the construction, assembly and maintenance of industrial plants. Delfino seeks compensation in the amounts of USD 94,113, ITL 429,819,605 (USD 370,758) and IQD 66,217 (USD 212,483) for contract losses, loss of tangible property and financial losses.

396. Delfino stated that it went into voluntary liquidation in March 1994 and into bankruptcy in January 1996.

Table 25. DELFINO'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 398,776 |
| Loss of tangible property | 66,095 |
| Financial losses | 212,483 |
| TOTAL | 677,354 |

## A. Contract losses

### 1. Facts and contentions

#### (a) Jebel Kara contract

397. Delfino entered into a contract dated 24 May 1990 with the General Establishment for Water and Sewerage for the supply of equipment for the construction of two pumping stations in Jebel Kara in Iraq (the "Jebel Kara contract"). Delfino did not state the exact dates on which the Jebel Kara contract commenced or terminated.

398. Delfino alleged that it supplied engineering works in the amount of ITL 280,000,000 and completed a pipeline survey worth ITL 40,000,000.

399. Delfino seeks compensation for contract losses of ITL 320,000,000.

#### (b) Aradet contract

400. Delfino entered into a contract on 15 August 1989 with an Iraqi entity called the "Aradet" for the supply of tube bundles for heat exchangers (the "Aradet contract"). Delfino did not state the exact dates on which the contract commenced or terminated. Contract payments were to be effected under a letter of credit upon negotiation of the relevant shipping documentation. Delfino asserted that it delivered the materials on 20 July 1990.

401. Delfino submitted a copy of a telex dated 17 August 1990 from UBAE Arab Italian Bank, which stated with reference to Delfino's request for reimbursement under the letter of credit for the claimed amount, that according to a decree dated 2 August 1990 and "arrete" dated 4 August 1990, "all movements of funds on Iraqi nationals account are blocked by order of the French authorities".

402. Delfino seeks compensation of ITL 85,870,000 for losses allegedly incurred in connection with the Aradet contract for unpaid deliveries of materials.

(c) Saadiya contract

403. Delfino alleged that it entered into a contract with the State Organization for Water and Sewerage in respect of a turnkey water treatment plant (the "Saadiya contract"). Delfino failed to specify the date of the contract or the exact dates on which the Saadiya contract commenced or terminated.

404. Delfino described the alleged loss of USD 28,018 claimed under the Saadiya contract as "cash residue" and attributed it to Iraqi law 57/1990, a deterioration in relations between Iraq and Italy and a direction from the "Diwan of Presidency of Iraq", all of which are alleged to have stopped payments to Italian companies.

405. Delfino submitted a translation of a letter dated 4 December 1988 sent by the Central Bank of Iraq to Rafidain bank authorizing the transfer of the claimed amount of USD 28,018 as evidence of it alleged losses.

(d) State Enterprises contract

406. Delfino entered into a contract dated 20 March 1990 with the State Enterprise for Northern Gas Industry for the supply of bronze aluminum tubes (the "State Enterprises contract"). Delfino did not specify the exact dates on which the State Enterprises contract commenced or terminated. Contract payments were to be effected under a letter of credit against negotiation of the relevant shipping documentation. Delfino stated that it supplied tubes valued at ITL 23,949,605.

407. Delfino classified its loss under the State Enterprises contract as a loss of tangible property. However, as this aspect of the claim relates to the supply of goods for which Delfino allegedly was not paid, it has been reclassified as a claim for contract losses.

2. Analysis and valuation

(a) Jebel Kara contract

408. Delfino submitted as evidence of its alleged loss a copy of the contract, a report on "the foreseen and performed activities" and technical drawings of the pumping station.

409. The Panel recommends no compensation for the alleged losses arising under the Jebel Kara contract as Delfino has not provided sufficient evidence of the work performed.

(b) Aradet contract

410. The Panel recommends no compensation of the alleged losses as the French laws in question constituted a supervening event that made it impossible for Delfino to obtain payment for the goods it delivered to Iraq. Hence, the contract losses cannot be said to be a direct result of Iraq's invasion and occupation of Kuwait.

(c) Saadiya contract

411. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Delfino had a contract with Iraq.

412. The Panel recommends no compensation for contract losses arising under the Saadiya contract as the contract losses are debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

(d) State Enterprises contract

413. The Panel recommends no compensation for the alleged losses arising under the State Enterprises Contract as Delfino has submitted no evidence that performance was completed or that the asserted losses were a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

414. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

415. Delfino seeks compensation for USD 66,095 for the cost of seven vehicles, which, it alleged, were "blocked as a consequence of the events".

416. Delfino had also sought compensation of ITL 23,949,605 for loss of tangible property under the State Enterprises contract, which has been reclassified as a contract loss.

2. Analysis and valuation

417. Delfino provided three invoices for the purchase of the vehicles as evidence of its alleged losses. Delfino failed to submit any other evidence in support of its claim.

418. The Panel recommends no compensation for loss of tangible property as Delfino has not provided sufficient evidence of its title to or right to use the vehicles.

3. Recommendation

419. The Panel recommends no compensation for loss of tangible property.

C. Financial losses

1. Facts and contentions

420. Delfino seeks compensation for IQD 5,943 for the alleged loss of its bank account with the Rafidain bank in Iraq and IQD 963 for the alleged loss of cash from its safe in Iraq.

421. Delfino also seeks compensation of IQD 206,011 for the alleged cost of bank guarantees. Delfino made an error in calculating this figure. According to the information provided by Delfino, the correct amount is, in fact, IQD 59,311.

2. Analysis and valuation

422. Delfino failed to state whether the funds in the Iraqi bank account were convertible or transferable. It simply stated that the account has been "blocked" as a result of various Iraqi and Italian laws.

423. It is not clear how the losses alleged in respect of the cash in Delfino's safe in Iraq or the bank guarantees have been calculated or how they arose. With reference to the bank guarantee allegedly obtained for the Saadiya contract, Delfino simply stated that it was impossible to recover the guarantee. Delfino failed to state how the alleged loss of the guarantees arose.

424. The Panel recommends no compensation for financial losses as Delfino has failed to provided sufficient evidence that its losses were a direct result of Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

425. The Panel recommends no compensation for financial losses.

## D. Recommendation for Delfino

Table 26. RECOMMENDED COMPENSATION FOR DELFINO

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 398,776 | nil |
| Loss of tangible property | 66,095 | nil |
| Financial losses | 212,483 | nil |
| TOTAL | 667,354 | nil |

426. Based on its findings regarding Delfino's claim, the Panel recommends no compensation.

## XVI. CLAIM OF SICOM S.P.A.

427. SICOM S.p.A. ("SICOM") is an Italian civil engineering company that specialises in the construction and supply of electro-mechanical installations. SICOM seeks compensation for loss of tangible property in the amount of USD 1,002,048.

428. According to documentation submitted by SICOM, SICOM went into voluntary liquidation in December 1993.

Table 27. SICOM'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Loss of tangible property | 1,002,048 |
| TOTAL | 1,002,048 |

## A. Loss of tangible property

### 1. Facts and contentions

429. SICOM was a subcontractor to another Italian company, Gruppo Industriale Elettro Meccanico per Impianti all'Estero S.p.A., on two projects, namely, the extension of the Daura Thermal Station and the installation of electro-mechanical works for the Mosul 3 Pumped Storage Scheme in Iraq (the "subcontracted works"). SICOM did not state the dates of the subcontracts or provide copies of the underlying contracts.

430. SICOM stated that it imported equipment and vehicles and employed local and expatriate personnel in order to carry out the subcontracted works. It seeks compensation in the amount of USD 1,002,048 for equipment and vehicles located on its projects sites, which, it alleged, were expropriated by Iraqi authorities pursuant to a Presidential decree.

### 2. Analysis and valuation

431. SICOM submitted lists of the equipment and vehicles alleged to have been expropriated by the Iraqi authorities as evidence of its alleged losses.

432. The Panel recommends no compensation for loss of tangible property as SICOM has not submitted sufficient evidence or documentation to support its alleged losses.

### 3. Recommendation

433. The Panel recommends no compensation for loss of tangible property.

B. Recommendation for SICOM

Table 28. RECOMMENDED COMPENSATION FOR SICOM

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Loss of tangible property | 1,002,048 | nil |
| TOTAL | 1,002,048 | nil |

434. Based on its findings regarding SICOM's claim, the Panel recommends no compensation.

XVIII. CLAIM OF ITALSTRADE S.P.A.

435. On 23 November 1999, the Commission received a notice of withdrawal of the claim by Italstrade S.p.A. ("Italstrade") from the Government of Italy. In the light of this communication, the Panel issued a procedural order on 13 December 1999, pursuant to article 42 of the Rules, acknowledging the withdrawal and terminating the Panel's proceedings with respect to the claim by Italstrade.

XVII. CLAIM OF IMPRESIT GIROLA LODIGIANI (IMPREGILO) S.P.A

436. On 23 November 1999, the Commission received a notice of withdrawal of the claim by Impresit Girola Lodigiani (IMPREGILO) S.p.A. ("IMPREGILO") from the Government of Italy. In the light of this communication, the Panel issued a procedural order on 13 December 1999, pursuant to article 42 of the Rules, acknowledging the withdrawal and terminating the Panel's proceedings with respect to the claim by IMPREGILO.

# XIX. CLAIM OF VVO SELKHOZPROMEXPORT

437. VVO Selkhozpromexport ("Selkhozpromexport") is a Russian consortium of twelve firms who share an expertise in irrigation construction. Selkhozpromexport seeks compensation in the amount of USD 21,862,754 for contract losses, loss of profits, real property losses, loss of tangible property, payment or relief to others, other losses and interest.

Table 29. SELKHOZPROMEXPORT'S CLAIM

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 14,141,451 |
| Loss of profits | 527,074 |
| Real property losses | 340,248 |
| Loss of tangible property | 509,613 |
| Payment or relief to others | 1,242,733 |
| Other losses | 580,317 |
| Interest | 4,521,318 |
| TOTAL | 21,862,754 |

## A. Contract losses

### 1. Facts and contentions

438. At the time of Iraq's invasion and occupation of Kuwait, Selkhozpromexport was involved in three projects in Iraq, namely:

a. the design and construction of an extensive irrigation system known as the Tigris-Euphrates Main Outfall Drain (the "Drain Project");

b. the construction of a large grain silo in Sulaimaniya (the "Sulaimaniya Silo Project"); and

c. the delivery of spare parts for several other Iraqi grain silos (the "Silo Spare Parts Project").

439. These three projects were governed by five contracts:

i. Contract dated 20 May 1986 between Selkhozpromexport and the Ministry of Irrigation of the Republic of Iraq (the "Employer") for the provision of design work, equipment and materials, and supervision of construction on the Drain Project (the "Drain Construction contract");

ii. Contract dated 20 May 1986 between Selkhozpromexport and the Ministry of Irrigation of the Republic of Iraq (the "Employer") for the

supply over a 36 month period of spare parts for motor tractor facilities and road construction machinery used in the Drain Project (the "Drain Parts contract");

iii. Contract dated 7 April 1977 between Selkhozpromexport and the State Organization of Grain, Ministry of Trade, Baghdad (the "Employer") for the design and construction of four separate grain silos for the Sulaimaniya Silo Project (the "Silo Construction contract");

iv. Contract dated 25 June 1988 between Selkhozpromexport and the General Company for Grain Trading, Ministry of Trade of the Republic of Iraq (the "Employer") for the supply of spare parts to two silos in Makmour and Ba'aj, as part of the Silo Spare Parts Project (the "Makmour and Ba'aj Parts contract"); and

v. Contract dated 25 June 1988 between Selkhozpromexport and the General Company for Grain Trading, Ministry of Trade of the Republic of Iraq (the "Employer") for the supply of spare parts to nine other silos located in various Iraqi towns, as part of the Silo Spare Parts Project (the "Nine Silos Parts contract").

440. The Drain Project is an extensive irrigation system designed to capture water on the Mesopotamian Plain and channel it onto farmland near the Persian Gulf. Under the Drain Construction contract, Selkhozpromexport was responsible for assisting Iraq with the design and construction of the "Middle Part" of the Drain Project Scheme, which consisted of a 187 km stretch from Dalmaj to Nassiria. The Sulaimaniya Silo Project involved the construction of four separate grain silos. The Silo Spare Parts Project involved the supply of spare parts to grain silos in Iraq.

441. Selkhozpromexport alleged that as a result of Iraq's invasion and occupation of Kuwait, it was forced to evacuate its personnel from Iraq, terminate its ongoing work on both the Drain and the Sulaimaniya Silo Projects and cease shipments of spare part to Iraq.

(a) Drain Construction contract

442. Selkhozpromexport seeks compensation in the amount of USD 4,058,676 for contract losses arising in connection with the Drain Construction contract. This amount represents the total amount of unpaid invoices for services provided by its "Specialists" in supervising the construction of the Drain Project. Under the contract, the Employer agreed to pay for these services at monthly rates ranging from IQD 273 to IQD 508 in the following proportions: 60 per cent in United States dollars and 40 per cent in Iraqi dinar. The Employer was normally afforded 30 days in which to pay the invoices. However, the force majeure clause of the contract provided for payment within 45 days of all monies owing to Selkhozpromexport in the event of war.

443. Selkhozpromexport stated that following Iraq's invasion and occupation of Kuwait, its specialists continued work on the Drain Project until 16 January 1991 when they were forced to evacuate.

444. Between May 1989 and January 1991, Selkhozpromexport presented 38 invoices to the Employer for services rendered by its specialists. It had adopted a practice of sending the Employer two invoices every month - one for the 60 per cent United States dollar portion and the other for the 40 per cent Iraqi dinar portion. Therefore, of the 38 invoices presented to the Employer, 19 related to United States dollar amounts. Selkhozpromexport stated that of these invoices, only five were paid by the Employer. It also stated that the Employer paid only 16 Iraqi dinar invoices. The unpaid Iraqi dinar invoices and the unpaid United States dollar invoices amount to USD 207,118 and USD 3,851,558, respectively.

(b) Drain Parts contract

445. Selkhozpromexport seeks compensation in the amount of USD 9,608,774 in relation to unpaid invoices for spare parts shipped to Iraq between 29 September 1987 and 26 June 1990.

446. Selkhozpromexport began shipping the spare parts to the Employer under the Drain Parts contract in September 1987 and continued to do so on a regular basis up to 2 August 1990. The Employer paid for the spare parts through an irrevocable revolving letter of credit with the Bank of Foreign Trade of the former USSR. Selkhozpromexport stated that by 2 August 1990, it had shipped 73 per cent of the spare parts called for under the Drain Parts contract and had presented 124 invoices totaling USD 11,688,625 for spare parts delivered between 29 September 1987 and 26 June 1990.

447. Selkhozpromexport asserted that following Iraq's invasion and occupation of Kuwait, it was no longer safe to send shipments to that region and, in any event, work on the Drain Project had ceased due to Iraq's invasion and occupation of Kuwait.

(c) Makmour and Ba'aj Parts contracts

448. Selkhozpromexport seeks USD 293,801 for three unpaid invoices, namely invoice numbers 72/43015-1 to 72/43015-3, for spare parts and electrical equipment delivered to the Employer under the Makmour and Ba'aj Parts contract.

449. Selkhozpromexport commenced shipping the spare parts in January 1990 and made two further deliveries in April and July 1990. Selkhozpromexport asserted that shipments were halted as a result of Iraq's invasion and occupation of Kuwait by which time 67 per cent of the spare parts called for under the contract had been shipped to Iraq. For all these shipments, Selkhozpromexport alleged that the Employer had failed to pay the 10 per

cent cash portion due on delivery and had refused to pay the balance as the shipments were halted.

(d) Nine Silos Parts contract

450. Selkhozpromexport seeks compensation in the amount of USD 180,200 for four unpaid invoices, namely invoice numbers 72/53410-1 to 72/53410-4, for spare parts delivered under the Nine Silos Parts contract. Selkhozpromexport asserted that by August 1990 it had made four shipments, but had received no payments from the Employer.

451. Selkhozpromexport commenced shipping the spare parts in January 1990 and made three further deliveries - one in April and two in July 1990. Selkhozpromexport asserted that shipments were halted as a result of Iraq's invasion and occupation of Kuwait by which time 19 per cent of the spare parts had been shipped to Iraq. It stated that the Employer had failed to pay the 10 per cent cash portion due on delivery for all these shipments and had refused to pay the balance as the shipments were halted.

2. Analysis and valuation

(a) Drain Construction contract

452. Selkhozpromexport submitted as evidence of its losses a copy of the contract, a schedule of unpaid invoices, copies of the 17 unpaid invoices, an affidavit, requests for payment to the Employer and detailed back-up documentation for the invoices covering the work that was performed in each month from May 1990 through October 1990.

453. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Selkhozpromexport had a contract with Iraq.

454. The Panel finds that the value of the unpaid work performed prior to 2 May 1990 was USD 1,791,909. The value of the work that was performed after 2 May 1990 was USD 2,266,767.

455. Selkhozpromexport relied on the force majeure provisions contained in the contract to claim that all payments owing in respect of completed works became due following Iraq's invasion and occupation of Kuwait. Hence, Selkhozpromexport asserted that notwithstanding any jurisdictional exclusion imposed by Security Council resolution 687 (1991), such provisions should govern and compensation should be awarded according to the terms of these provisions.

456. The Panel finds that such contractual agreements or clauses can not override the "arising prior to" exclusion in Security Council resolution 687.

457. The Panel finds that the losses that allegedly arose in connection with work performed prior to 2 May 1990 are outside the jurisdiction of the Commission.

458. The Panel recommends compensation of USD 2,266,767 in respect of all unpaid work that was performed after 2 May 1990 as the losses were due to the forced evacuation of Selkhozpromexport's personnel from Iraq.

(b) Drain Parts contract

459. Selkhozpromexport submitted as evidence of its losses a copy of the contract, a copy of an irrevocable letter of credit number 8/20865 opened pursuant to the Drain Parts contract, a schedule of unpaid invoices, a schedule of the total amounts outstanding for the 124 invoices, copies of the 124 invoices, an affidavit, requests to Iraq for payment and the Rafidain Bank in Baghdad from Selkhozpromexport and its bank, USSR Vneshtorgbank and the corresponding specification sheets and bills of lading.

460. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Selkhozpromexport had a contract with Iraq.

461. The Panel finds that invoice numbers 122 and 123 relate to the delivery of parts before 2 May 1990 and invoice number 124 relates to the delivery of parts after 2 May 1990.

462. Selkhozpromexport relied on the force majeure provisions contained in the contract to claim that all payments owing in respect of completed works became due following the invasion and occupation. Hence, Selkhozpromexport asserted that notwithstanding any jurisdictional exclusion imposed by Security Council resolution 687 (1991), such provisions should govern and compensation should be awarded according to the terms of these provisions.

463. The Panel finds that such contractual agreements or clauses can not override the "arising prior to" exclusion in Security Council resolution 687.

464. The Panel finds that the losses that allegedly arose in connection with invoice numbers 122 and 123 are outside the jurisdiction of the Commission.

465. The Panel recommends compensation of USD 160,684 in respect of losses incurred in connection with invoice number 124 as the losses were a direct result of Iraq's invasion and occupation of Kuwait.

(c) Makmour and Ba'aj Parts contracts

466. Selkhozpromexport submitted as evidence of its losses a copy of the contract, a copy of an irrevocable letter of credit, a schedule of unpaid invoices, copies of the three unpaid invoices, copies of the relevant bills of lading that accompanied the three shipments of parts, an affidavit and requests for payment.

467. Selkhozpromexport stated that under the contract it was only obliged to deliver "C&F, port Aqaba" in Jordan following which it was Iraq's responsibility to deliver the parts to the project site in Iraq. According to the contract, the date of the relevant bill of lading was deemed to be the date of delivery.

468. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Selkhozpromexport had a contract with Iraq.

469. The Panel finds that invoice numbers 72/43015-1 and 72/43015-2 relate to the delivery of parts before 2 May 1990 and invoice number 72/43015-3 relates to the delivery of parts after 2 May 1990.

470. Selkhozpromexport relied on the force majeure provisions contained in the contract to claim that all payments owing in respect of completed works became due following Iraq's invasion and occupation of Kuwait. Hence, Selkhozpromexport asserted that notwithstanding any jurisdictional exclusion imposed by Security Council resolution 687 (1991), such provisions should govern and compensation should be awarded according to the terms of these provisions.

471. The Panel finds that such contractual agreements or clauses can not override the "arising prior to" exclusion in Security Council resolution 687.

472. The Panel finds that the alleged losses that arose in connection with invoice numbers 72/43015-1 and 72/43015-2 are outside the jurisdiction of the Commission.

473. The Panel recommends compensation of USD 150,340 in respect of losses incurred in connection with invoice 72/43015-3 as the losses were a direct result of Iraq's invasion and occupation of Kuwait.

(d) Nine Silos Parts contract

474. Selkhozpromexport submitted as evidence of its losses a copy of the contract, a copy of an irrevocable letter of credit opened pursuant to the contract, a schedule of unpaid invoices, copies of the four unpaid invoices, copies of the relevant bills of lading that accompanied the three shipments of parts and an affidavit.

475. Selkhozpromexport stated that under the contract, it was only obliged to deliver "C&F, port Aqaba" in Jordan following which it was Iraq's responsibility to deliver the parts to the project site in Iraq. According to the contract, the date of the relevant bill of lading was deemed to be the date of delivery.

476. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Selkhozpromexport had a contract with Iraq.

477. The Panel finds that invoice numbers 72/53410-1 and 72/53410-2 relate to the delivery of parts before 2 May 1990 and invoice numbers 72/53410-3 and 72/53410-4 relate to the delivery of parts after 2 May 1990.

478. Selkhozpromexport relied on the force majeure provisions contained in the contract to claim that all payments owing in respect of completed works became due following Iraq's invasion and occupation of Kuwait. Hence, Selkhozpromexport asserted that notwithstanding any jurisdictional exclusion imposed by Security Council resolution 687 (1991), such provisions should govern and compensation should be awarded according to the terms of these provisions.

479. The Panel finds that such contractual agreements or clauses cannot defeat the "arising prior to" exclusion in Security Council resolution 687.

480. The Panel finds that the alleged losses that arose in connection with invoices 72/53410-1 and 72/53410-2 are outside the jurisdiction of the Commission.

481. The Panel recommends compensation of USD 155,314 in respect of losses incurred in connection with invoice numbers 72/53410-3 and 72/53410-4 as the losses were a direct result of Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

482. The Panel recommends compensation in the amount of USD 2,733,105 for contract losses.

## B. Loss of profits

### 1. Facts and contentions

483. Selkhozpromexport seeks compensation of USD 527,074 for loss of profits under the Drain Parts, Makmour and Ba'aj, and Nine Silos Parts contracts in respect of parts, which, it alleged, it was unable to deliver as a result of Iraq's invasion and occupation of Kuwait. Selkhozpromexport stated that it had scheduled deliveries of the remaining parts under each contract for August and September 1990.

484. Selkhozpromexport asserted that it had purchased all the parts required under each contract from third parties. Selkhozpromexport stated that it sold the undelivered parts on the Soviet domestic market at cost price.

485. Selkhozpromexport alleged that it lost future profit of USD 437,885 under the Drain Parts contract, which represents a 10 per cent profit margin on the value of undelivered parts. The undelivered parts represented 27 per cent of the total parts under the Drain Parts contract.

486. Selkhozpromexport alleged that it lost future profit of USD 14,327 under the Makmour and Ba'aj Parts contracts, which represents a 10 per cent margin on the undelivered parts. The undelivered parts represented 33 per cent of the total parts under the Makmour and Ba'aj contracts.

487. Selkhozpromexport alleged it lost future profit of USD 74,862 under the Nine Silos Parts contract, which represents a 10 per cent margin on the undelivered parts. The undelivered parts represented 81 per cent of the total parts under the Nine Silos Parts contract.

488. Selkhozpromexport stated that in each case its anticipated profit margin was the difference between the contract price and the cost price.

489. Selkhozpromexport stated that it did not deduct shipping and other direct and administrative costs in calculating its alleged loss of profits as it incurred the same level of costs in seeking out and selling the parts to third parties on the Soviet domestic market. Selkhozpromexport asserted that such costs would have been minimal in any case.

2. Analysis and valuation

490. Selkhozpromexport asserted that it would have been unsafe to ship goods during the hostilities and, in any event, Iraq's need for the additional parts was eliminated by the termination of the two construction contracts caused by the forced evacuation of Selkhozpromexport's employees from Iraq.

491. Selkhozpromexport provided copies of the relevant spare parts contracts, a summary of the unpaid invoices, bank statements and one affidavit in support of its claim that it would have typically made a 10 per cent margin. It also provided a list of previous contracts, which notes the time of performance, the total contract price and the value of the completed work. However, Selkhozpromexport declined to submit calculations of projected profit in the make up of each contract despite being requested to do so.

492. The Panel recommends no compensation for the alleged loss of profits as Selkhozpromexport has failed to provide evidence that establishes with reasonable certainty ongoing and expected profitability.

### 3. Recommendation

493. The Panel recommends no compensation for loss of profits.

## C. Real property losses

### 1. Facts and contentions

494. In its original submission, Selkhozpromexport sought compensation for loss of tangible property from the Sulaimaniya Silo Project site in the amount of USD 543,856. Two losses claimed as tangible property losses have been reclassified for the purposes of this report as real property losses as they relate to damage to buildings.

495. The first asserted loss of USD 337,521 arises in connection with the alleged damage to permanent buildings on the Sulaimaniya Silo Project site. The second asserted loss of USD 2,727 arises in connection with the alleged damage to Selkhozpromexport's office in Baghdad.

496. Selkhozpromexport alleged that it was forced to evacuate its personnel and suspend all work on site on 16 January 1991. Selkhozpromexport stated that after its departure from Iraq, the project site sustained significant damage as a result of hostilities and was also vandalized and looted as a result of civil unrest in Iraq.

### 2. Analysis and valuation

497. The Panel recommends no compensation for the alleged damage to the buildings on the Sulaimaniya Silo Project site and to the Baghdad office as Selkhozpromexport has failed to show that it has incurred the costs of repairing the damage and, therefore, has failed to demonstrate a compensable loss.

### 3. Recommendation

498. The Panel recommends no compensation for real property losses.

## D. Loss of tangible property

### 1. Facts and contentions

499. The claim for tangible property losses has been reclassified for the purposes of this report to include only those claimed losses that relate to tangible property. The reclassified claim amounts to USD 509,613 and comprises:

| Alleged loss item | IQD | USD equivalent |
|---|---|---|
| Equipment allegedly stolen from Selkhozpromexport's residence in Baghdad | 2,922 | 9,376 |
| Customs penalty allegedly paid for motor vehicle | 100 | 321 |
| Equipment allegedly stolen from Selkhozpromexport's residences in Sulaimaniya | 57,873 | 185,703 |
| Materials allegedly stolen from Selkhozpromexport's site in Sulaimaniya | 2,558 | 8,208 |
| Losses allegedly incurred by Selkhozpromexport's Iraqi subcontractor | 95,364 | 306,005 |
| TOTAL | 158,817 | 509,613 |

500. Selkhozpromexport stated that it evacuated the last of it personnel from the site on 16 January 1991. It secured the equipment and hired Iraqi security personnel to protect the site. Selkhozpromexport asserted that notwithstanding its efforts to protect the site shelling and rioting destroyed virtually all of its property. It stated that all remaining property was stolen from the site during a period of unrest that followed the end of hostilities. The property that was allegedly stolen or destroyed consisted of machinery, vehicles, furniture for housing its personnel and other tangible property.

### 2. Analysis and valuation

501. Selkhozpromexport provided as evidence of its own losses schedules of the allegedly stolen or damaged property, photographs of the Sulaimaniya Silo Project site taken after the damage had been caused, descriptions of the photographs, an affidavit purporting to support the accuracy of the foregoing, a letter to the police from Selkhozpromexport's Iraqi agent detailing items allegedly stolen, a report from its Iraqi subcontractor describing equipment and materials allegedly stolen from site, a handwritten inventory dated 14 November 1991 of furniture allegedly stolen from the Baghdad office, an account for customs penalty and invoices and receipts in respect of Selkhozpromexport's equipment and materials on the Sulaimaniya site.

502. The Panel finds that Selkhozpromexport has established its ownership and the presence of the tangible property in Iraq at 2 August 1990. The Panel finds that the loss of the tangible property was a direct result of Iraq's invasion and occupation of Kuwait.

503. The Panel recommends compensation of USD 69,529 in respect of the loss of equipment from Selkhozpromexport's residences in Baghdad and Sulaimaniya. The Panel recommends no compensation of the loss of materials from the Sulaimaniya Project site. The amount of recommended compensation is calculated as follows:

| Alleged loss item | Claimed amount USD | Recommended compensation USD |
|---|---|---|
| Equipment allegedly stolen from Selkhozpromexport's residence in Baghdad | 9,376 | 2,575 |
| Customs penalty allegedly paid for motor vehicle | 321 | nil |
| Equipment allegedly stolen from Selkhozpromexport's residences in Sulaimaniya | 185,703 | 66,954 |
| Materials allegedly stolen from Selkhozpromexport's site in Sulaimaniya | 8,208 | nil |
| Losses allegedly incurred by Selkhozpromexport's Iraqi subcontractor | 306,005 | nil |
| TOTAL | 509,613 | 69,529 |

504. Selkhozpromexport failed to provide evidence in support of its claim for the alleged payment of the customs penalty. The Panel recommends no compensation for the alleged payment of the customs penalty as Selkhozpromexport has failed to provide sufficient evidence in support of its alleged loss.

505. The Panel recommends no compensation for the losses alleged to have been incurred by the Iraqi subcontractor. Pursuant to Security Council resolution 687 and Governing Council decision 7, Iraqi entities shall not be compensated for losses incurred as a result of Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

506. The Panel recommends compensation in the amount of USD 69,529 for loss of tangible property.

## E. Payment or relief to others

### 1. Facts and contentions

507. Selkhozpromexport seeks compensation of USD 1,242,733 for the cost of evacuating its employees and their dependants from the Drain Project and Sulaimaniya Silo Project sites to Russia. Selkhozpromexport alleged that between 28 August 1990 and 20 January 1991, it evacuated all 524 of its employees and their dependants from Iraq. Selkhozpromexport stated that the evacuation was necessary to protect Selkhozpromexport's employees and dependants from the dangerous conditions resulting from Iraq's invasion and occupation of Kuwait.

508. Of the 524 evacuees, 493 were affiliated to the Drain Project and 31 were affiliated to the Sulaimaniya Silo Project. Selkhozpromexport alleged that in nearly all cases it incurred the costs of commercial flights from Baghdad to Moscow, luggage transportation costs and the cost of Iraqi airport tax. Selkhozpromexport asserted that it also incurred hotel costs and wages and expense allowances for the evacuees while they waited in Moscow for onward transportation to their homes.

### 2. Analysis and valuation

509. Selkhozpromexport stated that the cost of evacuating its personnel from the Drain Project site was in excess of what it normally would have incurred under the Drain Construction contract as the Employer was responsible under the Drain Construction contract for the cost of repatriating Selkhozpromexport's specialists and their dependants when the contract works were completed.

510. Selkhozpromexport failed to provide an explanation of how the cost allegedly incurred in respect of the Sulaimaniya Silo Project was in excess of what Selkhozpromexport normally would have incurred on completion of the project. It did not assert that the Employer was responsible for the costs of repatriation following completion of the project.

511. With respect to the alleged hotel costs and wages and expense allowances for the evacuees while they waited in Moscow for onward transportation, Selkhozpromexport argued that under Soviet law at the time, it was obliged to pay the costs it incurred in accommodating its employees while they remained in Moscow and in transporting them home. The law allegedly required Selkhozpromexport to provide "living premises rent in case of compelled delay traveling within the U.S.S.R. according to rates set for the rent of premises during business trip within the U.S.S.R.".

512. Selkhozpromexport submitted as evidence of its losses schedules of the evacuees, Iraqi Police Registration forms for employees working on the Sulaimaniya Silo Project together with a letter from Selkhozpromexport identifying the employees working on the project, payroll records for August

and December 1990 for the Sulaimaniya Silo Project and back-up documentation recording work performed by specialists on the Drain Project from May through October 1990, a letter from Aeroflot enclosing invoices in the amount of SUR 300,000 together with copies of a payment order and a bank statement evidencing debit of SUR 300,000, and a balance sheet for expenses incurred under both projects in respect of air tickets, luggage, and accommodation and transport expenses.

513. Selkhozpromexport submitted audited accounts and a spreadsheet as evidence of the alleged hotel and other expenses incurred in maintaining its employees in Moscow.

514. The Panel finds that under the terms of the Drain Construction contract, the Employer was responsible for the cost of repatriating Selkhozpromexport's specialists and their dependants to Moscow following completion of the project. Hence, those costs incurred by Selkhozpromexport in evacuating its specialists and their dependants from the Drain Construction Project for which Selkhozpromexport provided proof of payment are compensable. Selkhozpromexport provided proof of payment on 5 November 1990 of SUR 300,000 to Aeroflot comprising SUR 60,203 for transporting 85 adults and 7 children, as well as excess luggage from Baghdad to Moscow, and SUR 239,797 as advance payments for transporting 400 passengers and 32,000 kg of baggage.

515. The Panel recommends compensation in the amount of USD 500,000, which represents the United States dollar equivalent of the alleged costs of SUR 300,000 on 5 November 1990.

516. The Panel recommends no compensation for the payment or relief to others allegedly incurred in connection with the Sulaimaniya Silo Project as Selkhozpromexport has not provided sufficient evidence that the costs incurred were extraordinary or temporary in nature.

517. The Panel recommends no compensation for losses relating to hotel and other expenses incurred in Moscow, transportation of the employees to their homes and airport tax as Selkhozpromexport has failed to provide adequate proof of payment of the alleged costs.

### 3. Recommendation

518. The Panel recommends compensation in the amount of USD 500,000 for payment or relief to others.

## F. Other losses

### 1. Facts and contentions

519. Selkhozpromexport seeks compensation in the amount of IQD 174,364 for contract losses incurred by its Iraqi subcontractor in connection with the Sulaimaniya Silo Project. Selkhozpromexport stated that of the total claimed amount of IQD 269,728, it paid the Iraqi subcontractor an amount of IQD 200,000, which Selkhozpromexport was satisfied it owed to the Iraqi subcontractor for all its alleged losses. Some of the claimed amount has been reclassified as loss of tangible property as it relates to the alleged theft of the Iraqi subcontractor's property.

520. Selkhozpromexport also seeks compensation of USD 20,819 for costs, including insurance costs of IQD 435, it allegedly incurred in hiring two guards to protect the Sulaimaniya Silo Project site, following Selkhozpromexport's evacuation from Iraq, from January 1991 to April 1992. According to Selkhozpromexport's agreement with its Iraqi subcontractor, the Iraqi subcontractor was obliged to provide guarding and monitoring of operations. Selkhozpromexport asserted, however, that this did not extend to providing security after operations on site had ceased. Selkhozpromexport deemed it necessary, in any case, to retain further security for the site.

### 2. Analysis and valuation

521. The Panel recommends no compensation for the alleged loss incurred by the Iraqi subcontractor. Pursuant to Security Council resolution 687 and Governing Council decision 7, Iraqi entities shall not be compensated for losses incurred as a result of Iraq's invasion and occupation of Kuwait.

522. Selkhozpromexport submitted copies of time sheets in support of its claim for the cost of security guards, but failed to provide proof of payment to the security guards.

523. The Panel recommends no compensation for the alleged cost of hiring the security guards as Selkhozpromexport has failed to provide sufficient evidence in support of its alleged losses.

524. Selkhozpromexport failed to provide proof of payment of the alleged insurance costs. The Panel recommends no compensation for the alleged cost of insurance as Selkhozpromexport has failed to provide sufficient evidence in support of its alleged loss.

### 3. Recommendation

525. The Panel recommends no compensation of other losses.

## G. Recommendation for Selkhozpromexport

Table 30. RECOMMENDED COMPENSATION FOR SELKHOZPROMEXPORT

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 14,141,451 | 2,733,105 |
| Loss of profits | 527,074 | nil |
| Real property losses | 340,248 | nil |
| Loss of tangible property | 509,613 | 69,529 |
| Payment or relief to others | 1,242,733 | 500,000 |
| Other losses | 580,317 | nil |
| Interest | 4,521,318 | nil |
| TOTAL | 21,862,754 | 3,302,634 |

526. Based on its findings regarding Selkhozpromexport's claim, the Panel recommends compensation in the amount of USD 3,302,634.

XX. CLAIMS OF ENERGOPROJEKT HIDROINŽENJERING CONSULTING ENGINEERS CO. LTD.

527. Energoprojekt Hidroinženjering Consulting Engineers Co. Ltd. ("Energoprojekt"), a joint stock company incorporated in Yugoslavia, is involved in design, consulting and engineering services for hydropower, water economy and infrastructural plants. Energoprojekt seeks compensation of USD 26,172,434 for contract losses, loss of profits, loss of tangible property and interest in connection with three projects in Iraq, namely, the Badush (1) Dam, Badush (2) Dam and Mandawa Dam projects.

528. In its original submission, Energoprojekt sought compensation in the amount of USD 19,325,308 and subsequently amended the claim amount to USD 26,172,434.

Table 31. ENERGOPROJEKT'S CLAIMS

| Claim element | Claim amount (USD) |
|---|---|
| Contract losses | 9,352,558 |
| Loss profit | 5,920,482 |
| Loss of tangible property | 158,019 |
| Interest | 10,741,375 |
| TOTAL | 26,172,434 |

## A. Contract losses

### 1. Facts and contentions

#### (a) Badush (1) Dam Project

529. Energoprojekt entered into a contract (the "contract") on 9 April 1988 with the Technical Corps for Special Projects (the "Employer") for the provision of consulting engineering services for the Badush (1) Dam Project (the "project") in Iraq. The Badush Dam is an earthfill dam located approximately 40km downstream of the Mosul Dam (or Saddam Dam). The total contract price was IQD 7,359,442. The contract price was later increased to IQD 7,644,338.

530. The services to be provided by Energoprojekt under the contract included the preparation or completion of the basic and final design, tender documents for mechanical and electrical works, detail design, "as built" drawings, on operation and maintenance manual, site investigation works and hydraulic model tests, construction management, shop inspection for hydro mechanical, mechanical and electrical equipment and the training of Iraqi staff. Provision of the services was scheduled to commence on 9 April 1988 and was due to be completed in 48 months. The contract priced the services according to the type of service rendered. The total contract amount was to

be paid on the submission to the Employer of monthly invoices. The Employer was obliged to discharge the amounts within 45 days of submission of the monthly invoices failing which they were deemed to have been accepted.

531. The total contract price was payable in United States dollars and Iraqi dinar in the ratio of 60:40 with the exception of work performed in Yugoslavia for which Energoprojekt was entitled to be paid entirely in United States dollars. The Employer was granted a credit arrangement in respect of part of the United States dollar portion. The credit terms afforded to the Employer were a one year grace period with payment over four years at five per cent interest per annum. The Employer also made cash advance payments to Energoprojekt, which were to be recouped by deducting an equal amount from each of the first 40 monthly invoices.

532. The provision of services commenced as scheduled and was in progress on 2 August 1990. At that time, Energoprojekt had submitted 36 invoices to the Employer for its approval. Energoprojekt continued working on the project until January 1991, whereafter further performance of the contract became impossible as Energoprojekt had evacuated all personnel. During this time, Energoprojekt submitted five more invoices covering consultancy services provided from August to December 1990. All of these invoices, save the last one, invoice number 41, were approved by the Employer.

533. Energoprojekt began the repatriation of its employees immediately after 2 August 1990. By 31 August 1990, approximately one half of the 52 personnel who were on site had been evacuated. Energoprojekt completed the process of repatriation by January 1991.

534. Energoprojekt attributed its losses to Iraq's invasion and occupation of Kuwait as it result in the forced evacuation of its employees, which made it impossible to continue after 7 January 1991.

535. Energoprojekt seeks compensation of USD 7,296,904 for the total amount of unpaid invoices less the amount of payments, including advance payments, received from the Employer.

(b) Badush (2) Dam Project

536. Energoprojekt entered into a contract (the "contract") on 16 February 1989 with the Technical Corps for Special Projects (the "Employer") for the provision of consulting engineering services for the Badush (2) Dam Project in Iraq. The contract was concluded as an Annex to the Badush (1) Dam contract. The total contract price was IQD 2,557,829. This amount was later increased to IQD 2,655,402.

537. The services to be provided under the contract included the preparation or carrying out of the basic and final design, tender documents for mechanical and electrical works, detail design, "as built" drawings, on operation and maintenance manual, site investigation works and hydraulic

model tests, construction management, shop inspection for hydro mechanical and mechanical and electrical equipment. The services were priced according to the type of service rendered to the Employer. The total contract amount was to be paid on the submission to the Employer of monthly invoices. The Employer was obliged to discharge the amounts within 45 days of submission of the monthly invoices, failing which, they were deemed to have been accepted.

538. The payment terms for the services rendered under the Badush (2) Dam Project were the same as for the Badush (1) Dam Project in all material respects.

539. Provision of the services was scheduled to commence on 16 February 1989 and was due to be completed in 40 months.

540. The provision of services commenced as scheduled and was in progress on 2 August 1990. At that stage, Energoprojekt had submitted 17 invoices to the Employer for its approval.

541. Energoprojekt continued working on the project until the end of September 1990, whereafter, it alleged, further performance of the contract became impossible. During that time, Energoprojekt submitted two more invoices covering consultancy services provided from August to September 1990. Each of these invoices was approved by the Employer.

542. Energoprojekt stated that it began the repatriation of its employees immediately after 2 August 1990. By October 1990 the process of repatriation from the Badush (2) Project had been completed.

543. Energoprojekt attributed its losses to Iraq's invasion and occupation of Kuwait as it resulted in the forced evacuation of its employees, which made it impossible to continue after September 1990.

544. Energoprojekt seeks compensation of USD 1,061,182 for the total amount of unpaid invoices less the amount of payments, including advance payments, received from the Employer.

(c) Mandawa Dam Project

545. Energoprojekt and an Iraqi entity, the Dijla Center for Studies and Designs ("Dijla"), entered into a contract (the "contract") on 11 July 1989 with the Ministry of Agriculture and Irrigation, State Commission for Dams (the "Employer") for the provision of consulting engineering services for the Mandawa Dam Project in Iraq. The Mandawa Dam is located 40 km downstream of the Bekhme Dam. Its purpose was to act as a regulating dam for water released from the Bekhme Dam. The total value of the contract was IQD 4,682,668.

546. On 29 September 1989, Energoprojekt and Dijla entered into a joint venture agreement whereby they agreed to form a joint venture for the provision of consulting engineering services for and completion of works on the Mandawa Dam Project in accordance with the terms of the contract. The joint venture agreement governed the distribution of work and revenues under the contract. It was agreed that Dijla would perform approximately 26 per cent of the work and that Energoprojekt would perform approximately 74 per cent. These figures varied for certain phases of the contract. Energoprojekt was to receive payment of 81 per cent of the value of the contact and Dijla was to receive the remaining 19 per cent. Energoprojekt asserted that it is only seeking compensation for its share of the alleged losses relating to the Mandawa Dam Project.

547. Work under the contract was scheduled to commence on 11 July 1989 and was due to be completed in 70 months. The scope of the services was organized into three distinct phases. Phase I involved the completion of a planning report and site investigation works. Phase II involved the design and preparation of tender documentation and completion of hydraulic model tests. Phase III involved the completion of a detailed design of the dam and various supervisory services during the course of the Dam's construction as set out in one of the appendices to the contract.

548. The value of the works was usually priced on a lump sum basis with the exception of the site investigation works, which were measured at agreed unit rates, and checking materials, which were to be paid on a "trip" basis. The total contract amount was to be paid on the submission to the Employer of monthly invoices. The Employer was obliged to discharge the amounts within sixty days of submission of the relevant monthly invoice, failing which, they were deemed to have been accepted.

549. The total contract price was payable in United States dollars and Iraqi dinar in the ratio of 64.85:35.15. The United States dollar portion was to be paid: 10 per cent cash advance payment and the remaining 90 per cent: 40 per cent in cash; and 50 per cent on a credit basis. The credit terms afforded to the Employer for the payment of the 50 per cent United States dollar portion were a one year grace period and payment over four years subject to 5 per cent interest per annum. The Central Bank of Iraq guaranteed payment of the United States dollar portion up to IQD 739,527 for Phases I and II, and IQD 778,926 for Phase III. The Iraqi dinar portion was to be paid: 10 per cent advance payment; and 90 per cent through invoices.

550. Work commenced as scheduled and was in progress on 2 August 1990. It was recorded by means of monthly invoices. Energoprojekt submitted five such invoices prior to 2 August 1990 covering services provided to the Employer from July 1989 to April 1990.

551. By 2 August 1990, all of Phase I had been completed with the exception of the final planning report of which only 10 per cent had been completed. None of Phase II had been completed. With reference to Phase III,

Energoprojekt asserted that it had 40 personnel engaged in "other relevant services" in Yugoslavia.

552. Energoprojekt attributed its losses to Iraq's invasion and occupation of Kuwait as it resulted in the forced evacuation of its employees.

553. Energoprojekt seeks compensation of USD 994,472 for the total amount of unpaid invoices less the amount of payments, including advance payments, received from the Employer.

2. Analysis and valuation

554. Energoprojekt submitted for each of the projects a copy of the contract and the contract conditions, monthly invoices/applications for payment, activity summary sheets and various schedules containing financial analyses of the amounts paid and due to Energoprojekt.

555. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Energoprojekt had, in each case, a contract with Iraq.

556. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement afforded to the Employers under each contract did not serve to novate the debt.

(a) Badush (1) Dam Project

557. The Panel finds that losses incurred in connection with the amount of USD 6,593,900 due under invoice numbers 1 to 33 relate to services performed prior to 2 May 1990 and, therefore, are outside the jurisdiction of the Commission.

558. The Panel finds that the failure of the Employer to pay the amount of USD 1,592,219 due under invoice numbers 34 to 41 was a direct result of Iraq's invasion and occupation of Kuwait.

559. The Panel recommends compensation of USD 703,004 for the losses incurred by Energoprojekt in connection with the failure of the Employer to pay the full amount of invoice numbers 34 to 41.

560. The amount of USD 703,004 recommended for compensation represents the total amount of USD 1,592,219 owed to Energoprojekt under invoice numbers 34 to 41 less advance payments in the amount of USD 889,215, which the Employer did not recover. This approach is in line with that adopted in the Panel's Report and Recommendations concerning the Sixth Instalment of "E3" claims (S/AC.26/1999/3) where the Panel found that the advances paid by the Employer, but unrecovered, should be deducted from the recommended compensation amounts.

(b) Badush (2) Dam Project

561. The Panel finds that losses incurred in connection with the amount of USD 1,340,008 due under invoice numbers 1 to 14 relate to services performed prior to 2 May 1990 and, therefore, are outside the jurisdiction of the Commission.

562. The Panel finds that the failure of the Employer to pay the amount of USD 399,836 due under invoice numbers 15 to 19 was a direct result of Iraq's invasion and occupation of Kuwait.

563. The Panel finds that the losses incurred by Energoprojekt in connection with the failure of the Employer to pay the amount of USD 399,836 due under invoice numbers 15 to 19 are compensable in principle.

564. The Panel, however, recommends no compensation as the compensable amount of USD 399,836 is exceeded by the total amount of advance payments of USD 678,662, which the Employer did not recover in respect of this project.

(c) Mandawa Dam Project

565. The Panel finds that the alleged losses of USD 994,472 incurred in connection with unpaid amounts under all of the 5 invoices relate to services performed prior to 2 May 1990 and, therefore, are outside the jurisdiction of the Commission.

### 3. Recommendation

566. The Panel recommends compensation in the amount of USD 703,004 for contract losses.

## B. Loss of profits

### 1. Facts and contentions

567. Energoprojekt seeks compensation of USD 3,907,290 for loss of profits it expected to earn from the remainder of all three projects. Energoprojekt also seeks compensation of USD 2,013,192 for the overhead costs it failed to recover in respect of all three projects. This aspect of the claim was classified by Energoprojekt under contract losses. However, considering that overhead costs and profit margins are inextricably linked, the Panel has reviewed the claim for loss of overheads together with the claim for loss of profits.

568. In its original claim, Energoprojekt calculated its loss of profits at 11 per cent of the gross earnings on each of the three projects. In a supplement submitted to the Commission in March 1998, Energoprojekt revised the net profit margin to 20.2 per cent of remaining gross fees under the contract for the Badush (1) Dam Project, 19.2 per cent for the Badush (2)

Dam Project and 18.9 per cent for the Mandawa Dam Project. Energoprojekt based these revisions on "Techno Economic Programmes" (the "TEP's"), which, it stated, it prepared in 1988 and 1989 for the purposes of evaluating possible expenses, earnings and revenues in connection with the contracts. The TEP's calculated a profit margin on the basis of the average profit margin Energoprojekt allegedly earned on other projects in Iraq.

569. Energoprojekt seeks compensation of USD 2,013,192 for the overhead costs it failed to recover from the three projects. Energoprojekt stated that in order to successfully execute the project it was necessary to mobilize a large team of specialist personnel and other resources at its headquarters in Belgrade and also on site in Iraq. Energoprojekt asserted that in each contract, provision was made for the contract to contribute to the overhead costs of its Belgrade headquarters in the amount of 10 per cent of the total contract value. It expected to recover these costs through the monthly progress payments over the lifetime of each contract. Energoprojekt alleged that its forced withdrawal from Iraq caused it a severe under-recovery of these costs.

570. Energoprojekt also asserted that following the repatriation of staff from its Iraqi site office for the Badush (1) and (2) Dam Projects, it had to lay them off for an average period of 6 months at a cost of USD 862,680.

571. With respect to the Mandawa Dam Project, Energoprojekt's original claim for loss of profits and overheads was overstated as it had included Dijla's share in the value of the uncompleted parts of the contract. Energoprojekt subsequently revised its claim to exclude the value of Dijla's share in the value of the uncompleted parts of the contract.

572. In its reply to a claim development letter, Energoprojekt acknowledged that it was six months behind schedule on the Mandawa Dam Project.

### 2. Analysis and valuation

573. Energoprojekt provided as evidence of its alleged losses copies of the TEP's for the Badush (1) and (2) Dam Projects, a statement that it was management policy that 10 per cent of the contract price was to be contributed towards head office overheads, a list of employees that were evacuated from Iraq including an estimate of their salaries, audited accounts for 1988 to 1990 and a schedule of profit margins allegedly earned on other projects in Iraq.

574. The Panel finds that Energoprojekt did not provide sufficient information or documentation to enable it to make valid comparisons between previous projects in Iraq and the three projects. The sales figures were recorded differently in the accounts from year to year and Energoprojekt did not attempt to reconcile the accounts with the projected figures in the TEP's.

575. With respect to the Mandawa Dam project, Energoprojekt had only completed 20 per cent of the project and still had four and three quarter years of the project to complete. Furthermore, Energoprojekt acknowledged that it was six months behind schedule. Hence, there was a significant risk of non-achievement of profit.

576. The Panel recommends no compensation for loss of profits as the claimant has failed to provide sufficient evidence to support its claim.

577. In its previous reports, the Panel has found that overheads for head offices are costs that are not separate items that are chargeable to the Employer. In commercial contracts such as the contracts at issue, the overheads are part of the non-recoverable items that are included in the rates charged by the contractor. As stated by Energoprojekt, the costs were expected to be recovered from the payments made under the interim certificates.

578. The Panel recommends no compensation for overheads.

### 3. Recommendation

579. The Panel recommends no compensation for loss of profits or overheads.

## C. Loss of tangible property

### 1. Facts and contentions

580. Energoprojekt seeks compensation of USD 158,019 for loss of tangible property as follows:

| Alleged loss item | Project | Claimed amount (USD) |
|---|---|---|
| Loss of equipment | Badush (1) Dam Project | 37,821 |
| Loss of equipment | Badush (2) Dam Project | 1,284 |
| Loss of equipment, rubber boats and vehicles | Mandawa Dam Project | 118,914 |
| TOTAL | | 158,019 |

581. Energoprojekt stated that following the evacuation of its employees from Iraq, it left behind unguarded equipment on site and in "rest houses" in Baghdad and Mosul. Energoprojekt asserted that according to unofficial information it received most of the equipment was destroyed or stolen.

## 2. Analysis and valuation

582. Energoprojekt submitted a list of equipment left behind at each project site, which includes a description of each item, its related invoice number and date and value in the original currency and United States dollars as evidence of its alleged losses. Energoprojekt also provided copies of purchase invoices, receipts and cheques together with translations thereof. All of these documents were dated prior to 2 August 1990.

583. The Panel finds that Energoprojekt has demonstrated a compensable loss in respect of the equipment purchased in Iraq. Energoprojekt has established that it departed from Iraq during the relevant time period and has demonstrated its ownership of the equipment in Iraq prior to 2 August 1990.

584. The Panel finds the equipment was unlikely to be transferred and used in connection with other projects. Therefore, the value of the equipment has been depreciated over the lifetime of the contract.

585. The Panel recommends compensation of USD 44,736 for loss of the equipment purchased in Iraq, as follows:

| Alleged loss item | Project | Claimed amount (USD) | Amount recommended for compensation (USD) |
|---|---|---|---|
| Loss of equipment | Badush (1) Dam project | 37,821 | 22,506 |
| Loss of equipment | Badush (2) Dam project | 1,284 | 1,071 |
| Loss of equipment, rubber boats and vehicles | Mandawa Dam project | 118,914 | 21,159 |
| TOTAL | | 158,019 | 44,736 |

586. Despite being requested to do so, Energoprojekt failed to provide importation documentation to prove the importation of the rubber boats and vehicles, which it had purchased outside of Iraq. It only provided a copy of minutes of a workers' council meeting according to which the council retroactively approved the purchase of the rubber boats and the vehicles. However, the details of the vehicles recorded in the minutes are not consistent with the alleged loss items.

587. The Panel recommends no compensation for the alleged loss of the rubber boats and the vehicles as Energoprojekt failed to provide sufficient evidence in support of its alleged losses.

### 3. Recommendation

588. The Panel recommends compensation in the amount of USD 44,736 for loss of tangible property.

## D. Recommendation for Energoprojekt

Table 32. RECOMMENDED COMPENSATION FOR ENERGOPROJEKT

| Claim element | Claim amount (USD) | Recommended Compensation (USD) |
|---|---|---|
| Contract losses | 9,352,558 | 703,004 |
| Loss of profits | 5,920,482 | nil |
| Loss of tangible property | 158,019 | 44,736 |
| Interest | 10,741,375 | nil |
| TOTAL | 26,172,434 | 747,740 |

589. Based on its findings regarding Energoprojekt's claim, the Panel recommends compensation in the amount of USD 747,740.

## XXI. RECOMMENDATIONS

590. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the claimants as a result of Iraq's invasion and occupation of Kuwait:

a. INTEGRA BAAC: NIL;

b. GIK Hidrogradnja: USD 1,660,599;

c. Transkomplekt Ltd.: USD 4,566;

d. Ingra d.d.: USD 3,187,778;

e. ABB Schaltanlagen GmbH: USD 155,049;

f. Asea Brown Boveri AG: NIL;

g. Hochtief Aktiengesellschaft vorm. Gebr. Helfmann: NIL;

h. Heilit & Woerner Bau AG: NIL;

i. Strabag AG: NIL;

j. Hindustan Construction Company Limited: NIL;

k. U.P. State Bridge Corporation Limited: NIL;

l. Gammon India Limited: NIL;

m. F.lli Delfino S.p.A.: NIL;

n. SICOM S.p.A.: NIL;

o. VVO Selkhozpromexport: USD 3,302,634;

p. Energoprojekt Hidroinženjering Consulting Engineers Co. Ltd.:
USD 747,740.

Geneva, 13 December 1999

(Signed) Mr. Werner Melis
Chairman

(Signed) Mr. David Mace
Commissioner

(Signed) Mr. Sompong Sucharitkul
Commissioner

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